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ONTARIO LABOUR RELATIONS BOARD REPORTS



October 1990



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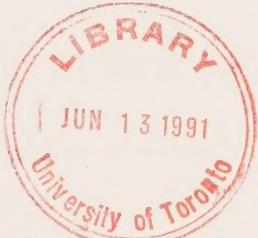
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**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1990] OLRB REP. OCTOBER

EDITOR: PERCIVAL S.C. TOOP

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.



Typeset, Printed and Bound by Union Labour in Ontario

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BEFORE: R. A. Furness, Vice-Chair, and Board Members C. A. Ballantine and W. N. Fraser.

APPEARANCES: N. L. Jesin and Paul Fitzgerald for the applicant; Keith Billings and Anthony H. Allen for Acco Canadian Material Handling, a division of Babcock Industries Canada Inc.; Fabio Pozzobon for Allied Conveyors Limited; Ken Niepage for Adam Clark Limited; Henry Franzen for

Comstock Canada; *Denis Flynn* for Nicholls Radtke Ltd.; *Al Fabian* for State Contractors Incorporated; *S.B.D. Wahl* and *William Howard* for intervener #1; *Keith Billings* for intervener #2.

DECISION OF THE BOARD; October 11, 1990

1. The name of the respondent appearing in Board File No. 2708-89-G is amended to read: "Acco Canadian Material Handling, a division of Babcock Industries Canada Inc."

2. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board pursuant to section 124 of the *Labour Relations Act* for final and binding determination in each of the above-noted matters.

3. Intervener #1 has taken the position that these grievances are in the nature of jurisdictional disputes and accordingly these grievances are inarbitrable and/or, without prejudice to that position, in the alternative, these grievances ought to be deferred pending the resolution of the jurisdictional disputes.

4. Intervener #2 supported the position taken by intervener #1. The position of intervener #1 was also supported by five of the six respondents. Allied Conveyors Limited did not make any submissions with respect to the position of intervener #1.

5. The work which gives rise to these referrals under section 124 was performed during the week of January 25, 1990, and was virtually completed during that week. The nature of the work consisted of the handling and installation of conveyors and equipment at the Ford Plant at Talbotville, Ontario. In a letter dated January 25, 1990, to each of the respondents the solicitors for the applicant have stated as follows:

Our client grieves that your company is in violation of the Provincial I.C.I. Collective Agreement between the Association of Millwrighting Contractors of Ontario and the Millwright District Council of Ontario with respect to work performed at the Ford-Talbotville job site. In particular your company has contravened the union security, sub-contracting, work jurisdiction, wage rates and other related clauses of said collective agreement.

The Millwright District Council of Ontario on behalf of itself and on behalf of its Local 1592 will seek the following relief:

1. A Declaration that [the company] has violated said collective agreement;
2. An Order that [the company] cease and desist from violating said collective agreement;
3. All damages, including monetary damages, incurred by the Millwright Union and its members as a result of [the company] violation of said collective agreement.

Please be advised that it will be our intention, to refer this matter to the Ontario Labour Relations Board pursuant to Section 124 of the *Labour Relations Act*.

6. For the most part, the work in question was assigned to composite crews consisting of equal numbers of millwrights and ironworkers. It was the position of the applicant that this assignment was without regard to the exact nature of the work to be performed. The respondents are each bound to the provincial collective agreements between The Association of Millwrighting Contractors of Ontario Inc. and The Millwright District Council of Ontario, effective from May 15, 1988, to and including April 30, 1990; and also between the Ontario Erectors Association, Incor-

porated, and The Ontario Erectors Association and The International Association of Bridge, Structural and Ornamental Ironworkers and The Ironworkers District Council of Ontario comprised of Local Unions 700, 721, 736, 759, 765 and 786, effective on May 1, 1988, until April 30, 1990.

7. There was no dispute with the position of intervener #2 that at least Acco Canadian Material Handling, a division of Babcock Industries Canada Inc. ("Acco") had assigned the work performed on a fifty-fifty basis under a threat by intervener #1 that if the work performed was assigned otherwise intervener #1 would grieve. When the work was assigned on a fifty-fifty basis the applicant grieved and has claimed the work exclusively. There was also no disagreement that there is a jurisdictional dispute, although no jurisdictional dispute has been filed with the Board or otherwise commenced. While there is no disagreement that there is a jurisdictional dispute each of the entities before the Board is extremely reluctant, to say the least, to file a jurisdictional dispute with the Board. The applicant awaits the filing of a jurisdictional dispute by the respondents or the interveners and vice versa. Understandably, there appears to be a reluctance to file a complaint under section 91 of the *Labour Relations Act* unless the complainant believes it has a good chance of success.

8. Legislation with respect to complaints about the assignment of work was introduced into the *Labour Relations Act* in 1960 by S.O. 1960, c. 54, s. 58. In 1966 the Board was given jurisdiction with respect to complaints concerning the assignment of work by S.O. 1966, c. 76, s. 25. The jurisdiction of the Board to entertain referrals to grievance in the construction industry was conferred as recently as 1975 by *The Labour Relations Amendment Act, 1975*, S.O. 1975, c. 76, s. 30. It is against this chronology that the Board considers the arguments which were addressed to it.

9. Intervener #1 argued that the practice of the Board in requiring it or the respondent or intervener #2 to file a complaint under section 91 of the *Labour Relations Act* was misguided and that where a trade union asserts a violation of its jurisdiction, it ought to be prepared to start legal proceedings before the Board or competent forum in order to enforce its jurisdiction. In the view of intervener #1, a return to the state of the law in 1960 as expressed in the decision of the British Columbia Court of Appeal in *Machinists, Fitters and Helpers, Local 3 v. Victoria Machinery Depot Co. Ltd. et al.* (1960) 22 D.L.R. (2d) 659, was appropriate and desirable. Intervener #1 further argued that the Board has never dealt with legal issues regarding arbitrability. Intervener #1 made extensive reference to *Ontario Hydro*, [1986] OLRB Rep. Oct. 1386.

10. In *Victoria, supra*, the action arose out of a jurisdictional dispute between two trade unions. The employer employed members of both trade unions and had a collective agreement with each trade union. One of the trade unions commenced an arbitration with the employer. The latter applied the award of the arbitration board which had been in favour of the trade union which commenced the arbitration. The award had the effect of assigning the work which had previously been done by members of the trade union which was not a party to the arbitration to members of the trade union which had been a party to the arbitration. The court held that the trade union which had not been a party to the arbitration was entitled to a declaration that the award of the arbitration board was void. The court observed that both collective agreements had similar "grievance" clauses which did not define "grievance". However, in both collective agreements these clauses followed immediately after the jurisdiction clauses. The court concluded that this meant that there was in the collective agreement a clear distinction between grievances and jurisdictional disputes and that jurisdictional disputes were not grievances and that if they are to be arbitrated the arbitration must be between the disputing trade unions and not between any trade union and the employer.

11. In *Ontario Hydro, supra*, the Board entertained a referral to grievance under section 124 of the Act. A trade union (the "first trade union") had contended that certain work had been assigned to a second trade union and that this constituted a breach of the collective agreement between the first trade union and the respondents to the referral under section 124. The respondents raised an objection to the jurisdiction of the Board and adopted the position that the grievance was in essence a jurisdictional dispute. The respondents contended that the effect of this was to deprive the Board of jurisdiction to hear the grievance under section 124 and that consequently the proceeding under section 124 ought to be terminated. The second trade union, which had appeared and was permitted to make representations, supported the respondents and also argued that the referral under section 124 ought to be adjourned in deference to the dispute resolution mechanism for work assignments between the first trade union and the respondents. In reply, the applicant argued that the Board had jurisdiction under section 124 because the grievance alleged a violation of a collective agreement and that the dispute resolution mechanism contained in the collective agreement either did not have to be utilized or had already been exhausted for a variety of reasons. Neither of the trade unions nor the respondents had filed or intended to file a complaint under section 91 of the Act. The Board concluded that, assuming, without finding that such a referral was also in essence a jurisdictional dispute, the jurisdiction of the Board was not ousted under section 124. At pages 1387-8 the Board stated as follows:

9. We do not find support for this proposition in either the purpose or language of section 124. No subjects are specifically exempted from its reach, nor is there any general implication that the ambit of this provision is less than comprehensive. It is true that the existence of section 91 suggests that it is the primary route under the Act for resolving jurisdictional disputes. This does not mean, however, that it is so exclusive that it deprives the Board of jurisdiction to hear a grievance which otherwise meets the requirements of section 124.

10. Certainly the Board has made it clear that it does not regard section 124 as the preferred forum for hearing matters which may touch on jurisdiction disputes, and that it may defer its proceedings under that section to allow jurisdictional disputes to be heard in a more appropriate manner. (See *Napev Construction Limited*, [1979] OLRB Rep. Sept. 886 and *Eaman Riggs Limited*, [1978] OLRB Rep. March 228.) Commonly, the Board will be asked to adjourn section 124 proceedings to allow a party to file a complaint under section 91, or if a section 91 complaint had already been filed, to defer a section 124 referral pending the disposition of the section 91 proceeding. The rationale for this is set out in *Napev Construction Limited*:

In a section 81 [now 91] complaint all trade unions and employers who may be affected by, or have an interest in the assignment of certain work may appear and participate in the proceedings, and the Board in reaching a decision is free to consider a broad range of relevant criteria. Further, once the Board makes a direction as to the assignment of work, the direction has the effect of overriding the terms of any collective agreements which do not conform with the direction. In our view, these factors mean that the resolution of disputes related to an assignment of work can be dealt with in a more appropriate manner in a section 81 proceeding than at arbitration.

11. This is quite a different proposition than the assertion that the Board under section 124 has no jurisdiction to hear grievances which relate to work assignments. The Board's confidence in its jurisdiction under section 124 is reflected in its practice of adjourning the arbitration referral, rather than terminating it. It may be that even after a section 91 determination has been made, there will be other issues relating to a grievance which will require resolution, in which case the Board can resume proceedings under section 124.

12. In *Re British Columbia Hydro & Power Authority and International Brotherhood of Electrical Workers, Local 258*, 32 L.A.C. (3d) 257, the arbitrator remarked that, in more recent times, there were two distinct lines of cases: one in which arbitrators or other labour tribunals have given *Victoria* full force and effect; the other in which considerable effort has been expended to distinguish the decision, or confine it to its narrowest possible *ratio decidendi*. The decision in

Victoria is, of course, not binding on this Board. We have no disagreement with the interpretation of *Victoria* as standing for the proposition that rights of non-parties may not be disposed of in an arbitration proceeding in the absence of the non-party. It appears that an arbitration award purported to determine trade jurisdiction under the terms of a collective agreement between an employer and one of two trade unions with whom it had collective agreements. See also *Re Council of Printing Industries of Canada (Southam-Murray) and Teamsters Union, Local 419*, 12 L.A.C. (3d) 1. The state of the law in Ontario with respect to who should receive notice of an arbitration between an employer and a trade union has recently been considered by the Court of Appeal in *Canadian Union of Public Employees v. Canadian Broadcasting Corporation et al.* (File No. 630/88, decision released May 11, 1990). In that decision, the Court of Appeal held that natural justice requires that notice of an arbitration between an employer and a trade union be given to any other trade unions who could be affected by the proceedings. Carthy, J. A. speaking for the court stated at page 4:

My thinking starts with a practical, common sense compulsion to put all these parties in one room, before one tribunal, to obtain one ruling on their differences.

The practice of the Board in referrals under section 124 with respect to the parties to such referrals is, of course, subject to the decision of the Court of Appeal.

13. The Board also considered the relationship between the resolution of grievances under a collective agreement in the construction industry and jurisdictional disputes in *Copper Cliff Mechanical Contractors Ltd.*, [1987] OLRB Rep. Nov. 1357. In that decision, the Board was called upon to determine the issue of whether the Board should decide in a proceeding under section 124 the correctness of a work assignment to members of a trade union other than the trade which was one of the parties to the grievance, where it was alleged the assignment had been made pursuant to a collective agreement other than the one under which the grievance arose. The Board held that it would not adjudicate the dispute over the work assignment in the context of a grievance proceeding and declined to make the other trade union a party to the grievance proceeding. The Board has long recognized proceedings under sections 91 and 124 of the Act as quite distinct and with different remedies available. The Board has also consistently given the parties and would be parties clear indications of the consequences of filing or not filing a complaint under section 91 in the context of a referral under section 124. In *Napev Construction Limited*, [1979] OLRB Rep. Sept. 886, the Board, after discussing the appropriateness of requesting relief under section 91 with respect to a jurisdictional dispute stated at page 888:

In this regard we would refer to the following excerpt from the Board's decision in *Eaman Riggs Limited*, [1978] OLRB Rep. March 228, a case in which the Board concluded it should entertain a section 81 [now 91] complaint rather than defer to arbitration.

33. The approach of the board of arbitration in *Re Robertson-Yates Corp. Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 18*, (1 L.A.C. (2d) 91) stresses the consensual aspect of jurisdictional claims to work and is essentially a two dimensional view of arbitration in the context of jurisdictional disputes. Such an approach no doubt serves the purposes of arbitration in the realm of collective bargaining in the industrial sector. However, the approach of this Board is three dimensional in that it first of all determines the merits of a jurisdictional dispute in a complaint under section 81 [now 91] of *The Labour Relations Act* before considering a grievance under a collective agreement under section 112a [now 124] of *The Labour Relations Act*. The nature of the construction industry with its craft trade unions, conflicting jurisdictional claims, the sequence of work to be performed on a project and the contractual arrangements between employers requires such a three dimensional approach. The two dimensional view reveals only an untypical cross-section of a situation in industrial relations in the construction industry whereas the three dimensional view permits the two dimensional view to be considered as part of the entire scenario

of such industrial relations. This Board possesses far wider remedial powers than a board of arbitration in that, this Board may, in determining a jurisdictional dispute after hearing from all of the interested parties, alter bargaining units defined in a certification or a collective agreement. Reference is made to section 81 [now 91] (15), (16), (17) and (18). In our view this Board's approach to jurisdictional disputes is more in accordance with the realities of the construction industry.

9. Taking these considerations into account, not only are we prepared to grant an adjournment to allow the filing of a section 81 [now 91] complaint, but we are of the view that such a complaint should be dealt with prior to the Board proceeding with this section 112a [now 124] referral.

10. Having regard to the above, this matter is adjourned to allow Local 1 to file, and the Board to consider, a complaint under section 81 [now 91] of the Act. If such a complaint is not filed within eighteen days from the date of this decision, the Board will proceed to consider the merits of this section 112a [now 124] referral.

14. In the instant referral, the applicant is not seeking a direction with respect to the assignment of certain defined work, it is seeking certain relief with respect to the conduct of the respondents. This flows from the conduct of the employer bargaining agencies in entering into what are arguably inconsistent obligations under two collective agreements. There is a mechanism under section 91 for the resolution of such inconsistent obligations with respect to the assignment of work which is open to the parties before the Board. However, none of the parties is compelled to file a complaint under section 91. In our view, the applicant is not required to file and be successful in a complaint under section 91 before it may proceed with its referral under section 124. Depending on the relative pressures which the applicant and intervener #1 may be able to exert on the respondents, intervener #1 and the applicant might well have appeared before the Board in each other's shoes in this referral with the tactical consequences which follow. The Board is of the view that the jurisdiction of the Board under section 124 is as set forth in *Ontario Hydro, supra*. Section 124 has not been made subject to the earlier legislation as stated in section 91. The Legislature has not seen fit to restrict the operation of section 124 as argued by intervener #1. The words "including any question as to whether a matter is arbitrable" in section 124(1) refer to the terms of the collective agreement under which the referral is made. Such words are not to be interpreted as an aide to tactical considerations in a perceived jurisdictional dispute.

15. The usual practice of the Board is to permit the filing of a complaint under section 91 of the Act and to postpone the application under section 124 until there has been a resolution of the complaint under section 91. However, where a complaint is not filed under section 91, the practice of the Board is to entertain the referral under section 124. On July 10, 1990, in Board File 0970-90-JD, intervener #1 filed a complaint under section 91 with respect to the work. A pre-hearing conference was scheduled for September 19, 1990, and has been adjourned. The Board will proceed, initially, to entertain the complaint under section 91. Subsequently, the Board will entertain the referral under section 124 with all of the would-be parties being given an initial opportunity to make representations on the effect of the decision of the Ontario Court of Appeal in *Canadian Union of Public Employees v. Canadian Broadcasting Corporation et al, supra*, on the referral under section 124.

0434-90-U National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada) and its Local 673, Complainants v. Bourque Consumer Electronics Service Inc. and Mr. Pierre Bourque, Respondents

First Contract Arbitration - Interference in Trade Unions - Intimidation and Coercion - Lockout - Remedies - Unfair Labour Practice - Employer recalling employees after first contract arbitration direction by Board - Employees subsequently laid off for "lack of work" - Layoff followed by employer approach to two members of union negotiating team with concessionary package - Employer use of layoff as lever to induce employees to agree to concessions constituting illegal lock-out where first contract arbitration direction made - Layoff constituting intimidation - Approaches to negotiating team members constituting direct bargaining and interference in trade union - Employer bankruptcy not improperly motivated - Employer personally and corporately liable for damages

BEFORE: Judith McCormack, Vice-Chair, and Board Members R. W. Pirrie and L. Hershkovitz.

APPEARANCES: Paul J. Falzone, R. I. Farquharson, Ralph Glass and Val Di Meo for the complainants; Russel Zinn and Pierre Bourque for Mr. Pierre Bourque; no one appearing for Bourque Consumer Electronics Service Inc.

DECISION OF JUDITH MCCORMACK, VICE-CHAIR, AND BOARD MEMBER L. HERSHKOVITZ; October 2, 1990

1. This is a complaint under section 89 of the *Labour Relations Act* alleging violations of sections 64, 66, 67, 70, 72, 75 and 76. No one appeared at the hearing on behalf of Bourque Consumer Electronics Service Inc. although it was duly notified of the date, time and place. The respondent Pierre Bourque did appear and was represented by counsel.

2. The respondent Pierre Bourque is the President of Bourque Consumer Electronics Service Inc. ("the Company") which operates electronics service facilities in Toronto, Calgary, Edmonton, Vancouver and Montreal. On March 29th, 1989, the union was certified as the bargaining agent for approximately fourteen employees at the Toronto location. After several months of negotiations, bargaining broke down, and employees went out on a legal strike on October 9th, 1989. Six months later, the union applied to the Board for a direction that the parties' first collective agreement be settled by arbitration. On May 7th, 1990, a differently constituted panel of the Board issued such a direction.

3. By virtue of section 40a(13), when a first contract direction is issued, a strike in process must be terminated forthwith, and the employer must reinstate employees. As a result, R.I. Farquharson, president of the union's Toronto local, called the Company on May 7, 1990 to make arrangements for employees to return to work. He spoke to Gino Sangiovanni, the general manager of the Company's Toronto operations, who told him that he had not yet received the Company's copy of the decision, that he would have to speak to the owner, and that he would get back to Mr. Farquharson. Later that same day, Mr. Farquharson called again and Mr. Sangiovanni advised him that all employees would be expected to return to work at the start of their shift on the second day following. Mr. Farquharson agreed and made arrangements to notify employees accordingly.

4. On May 9th, all employees reported for work except for several who had retired during the period of the strike. Most of the replacement workers hired during the strike had been laid off. Mr. Farquharson attended at the facility as well, and spoke to Mr. Sangiovanni about relations

between the various groups of employees. The discussion was cordial, and in the course of it, Mr. Farquharson asked Mr. Sangiovanni if he expected that there would be layoffs. Mr. Sangiovanni told Mr. Farquharson that there was enough work to keep on a full work crew for the foreseeable future.

5. Most of the first day of work was spent by employees cleaning up the facility. According to Ralph Glass, an employee of twenty-five years service, units requiring work and approximately 120-130 work orders which had accumulated over the period of the strike were stacked all over the shop. On May 10th, 1990, employees began working on the work orders and the five field technicians each made eight service calls. In the early afternoon, Mr. Sangiovanni told employees that he was being called back to Montreal on a personal matter involving an injury, and that Mukaila Akala, who had been hired during the strike, was in charge.

6. At approximately four o'clock p.m. that same day, Mr. Akala called Mr. Glass into his office and told him that he was laid off for lack of work. Mr. Glass was surprised to hear this as there was obviously a considerable amount of work. Since he was a senior employee, he asked whether that meant everyone was being laid off. Mr. Akala confirmed that they were. At that time, the Company's salesmen were continuing to sell service contracts over the telephone. These are contracts in which the Company undertakes to provide maintenance and repair services to customers over a period of time in the future. Mr. Glass asked Mr. Akala whether it wasn't illegal to be selling service contracts if all service employees were being laid off. Mr. Akala replied that it was not, but that the salesmen would be laid off the following day. All other bargaining unit employees were laid off on May 10th as well. Mr. Bourque testified that around this time, all employees of the Company except for one at each location across Canada were also laid off. At that point there was still a large number of work orders lying around the shop in Toronto. In addition, service runs consisting of a total of forty service calls had been laid out for the following day for the service technicians.

7. On Friday, May 11th, Mr. Glass and a number of other employees attended at the facility and spoke to Mr. Akala. Mr. Glass pointed out that although they had been laid off for lack of work, they knew that the runs were "sitting up there". Mr. Akala indicated that he didn't have to explain anything to them. Mr. Glass replied that Mr. Akala had signed the layoff slips referring to a lack of work, and that he and the other employees were there and ready to work. Mr. Akala then said that Mr. Bourque had personally instructed him to write out the slips indicating the lack of work. The employees stayed for approximately one-half hour to see whether any employees were being given work. They left when it became apparent that nothing was happening.

8. On Monday May 14th, Val Di Meo, one of the laid off employees, received an unexpected call from Mr. Bourque, who said that he had called Mr. Di Meo to get the telephone number for Brian Feil, the union's staff representative and spokesperson in negotiations. Mr. Di Meo told him that he didn't have his number and that Mr. Glass might have it. Mr. Bourque then asked Mr. Di Meo if employees were really serious about working, and said there was a chance they could "put the whole thing back together again". He set out a proposal to employees which consisted of the elimination of benefits, a two week cap on all vacations and a 10 per cent reduction in wages. Mr. Di Meo replied that he should discuss this with the group or the union. Mr. Bourque then said that if Mr. Di Meo thought there was going to be any severance pay, there was not. Mr. Di Meo responded that he was not going to take Mr. Bourque's word for this, and the telephone call ended.

9. Subsequently, Mr. Glass received a call from Mr. Bourque in which he said that he was trying to get a hold of Brian Feil. Mr. Glass explained that he was at the Canadian Labour Con-

gress Convention in Montreal. Mr. Bourque said that he would be contacting Bob White, the President of the union, in Montreal, so that he would be able to speak to Mr. Feil then. He then asked Mr. Glass if employees in Toronto were really interested in going back to work, or just interested in "sticking it to me". Mr. Glass replied that they were interested in going back to work. Mr. Bourque indicated that he was having financial problems, that he had been meeting with his bank and another electronics company, and that he was trying to make arrangements to forestall the wind-up of the business. He then told Mr. Glass to get a piece of paper and write down the following terms:

- (1) No benefits.
- (2) No pension.
- (3) Maximum of two weeks vacation.
- (4) Ten per cent reduction in wages.

10. Mr. Bourque asked Mr. Glass how he thought employees would react to this proposal. Mr. Glass said that he did not think that they would react well, and that he did not think Mr. Bourque could get enough employees on those terms for a viable operation. However, he said he couldn't speak for the others. Mr. Bourque then asked him to call the other employees with this offer, and to get back to him by noon the next day. He asked Mr. Glass if he personally would be willing to accept these terms and Mr. Glass replied that he would not. Mr. Bourque again asked Mr. Glass to poll other employees and said that he was trying to work out a solution and needed an answer right away.

11. That evening Mr. Glass spoke to other employees, and all rejected the terms proposed by Mr. Bourque. Mr. Glass also called Mr. Farquharson and told him about the conversation. The next morning Mr. Farquharson called Mr. Glass and told him that the union was contemplating filing charges. As a result, Mr. Glass decided not to call Mr. Bourque back as arranged, since he felt the charges would speak for themselves. The union then brought applications for an unlawful lockout declaration and associated relief.

12. Those applications were heard by the Vice-Chair alone on May 24th, 1990. No one appeared for either the Company or Mr. Bourque at that hearing. The Board on that day issued an unlawful lockout declaration with associated remedies. Subsequently, the respondent Pierre Bourque applied for reconsideration of that decision. The Board dismissed that application on September 28, 1990.

13. At the hearing of this section 89 complaint, Mr. Bourque testified to a number of financial problems his Company experienced during this period. He told the Board that Thompson Consumer Electronics Canada Inc. ("Thompson") licensed his Company to service their units and to distribute parts. In the past, Thompson had advanced the Company credit in the form of unpaid parts to facilitate servicing. However, by March of 1990, the Company owed Thompson \$250,000 in parts and Thompson cancelled the Company's credit. Then on May 4th, Mr. Bourque testified that he received a demand letter from the Royal Bank of Canada ("the Bank") with respect to \$762,786.17 owed by the Company which Mr. Bourque had personally guaranteed. That letter stated that unless payment was received by Friday, May 11th at noon, the Bank would take appropriate steps to protect their position. The letter was submitted as an exhibit at the hearing and appears to be dated May 8th.

14. After the letter was received, Mr. Bourque indicated that there were ongoing discus-

sions between the Bank, Thompson, and General Electric Canada Inc. to whom Mr. Bourque was looking for an injection of capital by way of a forgivable loan or a debenture. The Bank wanted further equity to be invested into the Company, further guarantees by the Company and the development of a plan which would prove the Company's viability. Thompson was prepared to write down the \$250,000 owed to it if the Bank did the same, and if the Company agreed to give up the parts business and its exclusive rights to service Calgary, Montreal and Edmonton. Thompson also wanted proof of profitability.

15. Mr. Bourque was not happy with Thompson's position because he felt that the writing down of the debt would be cancelled out by the loss of the parts business and exclusive servicing rights. However, discussions continued during that week and resumed early the following week. On May 10th, as noted earlier, the Company laid off most of its employees except for one employee at each location. On May 14th, Thompson indicated that it would consider giving the Company access to Thompson's main bank of customers, in exchange for the Company giving up the parts distributorship and service exclusivity. Again, this was contingent on proving the Company's viability.

16. At this point, Mr. Bourque called Mr. Di Meo and Mr. Glass with his offer of May 14th. The same offer made to employees in Toronto was put to employees at the Company's other locations. All agreed to the offer except for some of the employees in Calgary, and those in Toronto. The only other unionized employees, those in Quebec, indicated through their union that they were prepared to entertain the Company's offer under certain conditions.

17. Towards the end of the day of May 15th, Thompson withdrew its offer and gave notice of termination of the distributorship agreement with the Company. The next day, Mr. Bourque received a letter from General Electric Canada Inc. indicating that it had decided not to invest any capital in the Company. No further offer was forthcoming from Thompson and on the 16th, Mr. Bourque spoke to the law firm of Schindler, Goldberg. He came to the conclusion that the Company was no longer viable, and the lawyers at Schindler, Goldberg made an appointment for him on May 17th with Druker and Associates, who subsequently became the trustee in bankruptcy. On May 17th, Mr. Bourque signed papers to put the Company into bankruptcy and left for Europe.

18. The union alleges that the lay-off of May 10th and the subsequent offer to employees violated sections 64, 66, 67, 70, 72, 75 and 76. We turn first to the allegation that the lay-off of May 10th and the subsequent offer to employees amounted to an unlawful lockout contrary to sections 75 and 76.

19. This, of course, was the subject of the unlawful lockout declaration issued by the Board on May 24th, 1990. It was not contested that the union was entitled to rely on the Board's previous findings in these proceedings. However, because the union was adducing the same evidence before this panel in any event with respect to the alleged violations of other sections of the Act and because the respondents did not participate in the unlawful lockout hearings, we find it convenient to base our decision on the evidence before us, rather than on the Board's previous findings.

20. Sections 40a(13), 1(1)(k), 75 and 76 provide as follows:

40a-(13) The employees in the bargaining unit shall not strike and the employer shall not lock out such employees where a direction has been given under subsection (2) and, where such a direction is made during a strike by, or a lock-out of, employees in the bargaining unit, the employees shall forthwith terminate the strike or the employer shall forthwith terminate the lock-out and the employer shall forthwith reinstate the employees in the bargaining unit in the employment they had at the time the strike or lock-out commenced.

1(1)(k) "lock-out" includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees, or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers' organization, the trade union, or the employees;

75. No employer or employers' organization shall call or authorize or threaten to call or authorize an unlawful lock-out and no officer, official or agent of an employer or employers' organization shall counsel, procure, support or encourage an unlawful lock-out or threaten an unlawful lock-out.

76.-(1) No person shall do any act if he knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

(2) Subsection (1) does not apply to any act done in connection with a lawful strike or lawful lock-out.

21. In *Humpty Dumpty Foods Ltd.*, [1977] OLRB Rep. July 401 the Board commented on the requisite elements of a lockout under the Act:

13. The definition of "lock-out" as found in the Act consists of two elements: the act and the motive or purpose for the act. In order to establish that a lock-out has occurred it is not sufficient merely to show that there has been a closing of a place of employment, or a suspension of work or a refusal by an employer to continue to employ a number of his employees (i.e. a plant closure, relocation, layoff or contracting out of work etc.). It must also be established that any of these acts was done by the employer with a view to induce or compel *his employees* to refrain from exercising any rights or privileges under the Act or to agree to provisions or changes in provisions respecting terms or conditions of employment etc. Motive is an integral component of the definition and as a result the economic consequences are not in themselves determinative of the issue. The economic consequence must be as a result of one or other of the acts contemplated by the definition having been done by the employer with a view to compel or induce *his employees* in the manner set out in the definition; both the act and the motive must relate to those persons in the employ of the employer as of the date of the lock-out (i.e. "his employees"). (See re *Harry Woods Transport Limited* case, [1976] OLRB Rep. July 341, *Livingston Transportation Limited* case, [1976] OLRB Rep. July 346, *Amalgamated Electric Corporation Limited* case, [1963] OLRB Rep. July 430, *Fleetwood Corporation* case, [1974] OLRB Rep. June 385, *James Howden and Parsons* [1974] OLRB Rep. June 385, *James Howden and Parsons of Canada Ltd.*, [1969] OLRB Rep. July 537 and *Ralph Milrod Metal Products Limited* case, Board Files Nos. 1274-76-U and 1276-76-U, decision dated February 28, 1977).

[emphasis original]

22. The essence of Mr. Bourque's position is that the lay-off of May 10th and the subsequent offer to employees were unrelated, and thus these two events did not amount to an attempt to induce employees to agree to changes in their conditions of employment. He testified that financial negotiations came to a halt on May 10th, and that the layoffs were caused by the Company closing down operations because of financial insolvency. Mr. Bourque explains the offer put to Mr. Di Meo and Mr. Glass on May 14th as the result of Thompson's new offer on that date which spurred Mr. Bourque to make a last ditch effort to try and save the Company.

23. We have considerable difficulties with Mr. Bourque's position. Generally speaking, we

found him to be an evasive and untruthful witness, whose testimony was highly influenced by self-interest. But even accepting his evidence to a large extent, there are a number of features which undermine his explanation of why employees were laid off on May 10th. While there may well have been a lull in negotiations, it was evident that discussions with respect to the viability of the Company continued after May 10th, and that salesmen were still selling service contracts to customers even as employees were being laid off. This latter point seems particularly inconsistent with Mr. Bourque's assertion that the Company was closing down at that stage. The Bank's deadline was actually the 11th of May, and even then, the evidence indicates the Bank continued to go on negotiating at least until the 16th. Mr. Bourque testified that the Bank told him at a certain point that they had a right to the Company's assets and accounts receivable, that he had no further access to operating monies and that the Company could not meet its account payables. We do not doubt that the Bank was concerned about protecting the assets of the Company during that time; however, Mr. Bourque was vague as to the specific point at which he no longer had access to operating monies. He admitted that the Bank never actually assumed control of the Company during this period, and there was no evidence in any event that the Bank wished to have employees laid off or gave Mr. Bourque instructions to this effect. Mr. Bourque indicated that Schindler, Goldberg had advised him to lay employees off. However, he could not explain why the termination slips for employees would cite "lack of work" as the reason for the lay-off. He denied having given Mr. Akala instructions to this effect. There was no suggestion in Mr. Bourque's evidence that there actually was a shortage of work.

24. There are a number of unusual features about his testimony with respect to the new Thompson offer as well, which he told the Board prompted his call to the two employees. According to Mr. Bourque, Thompson's president Lorne Campbell called him on Monday, May 14th because since the lay-off on Friday, Thompson had received a "tremendous" number of calls from irate customers wondering how their units would be serviced. As a result, Thompson realized it might have trouble servicing customers, and was now prepared to consider another offer.

25. We find it interesting that after a strike of six weeks during which the evidence indicates work orders had piled up, a closure of only one working day would produce a "tremendous" number of calls from Bourque customers directly to Thompson, apparently over the course of a weekend. It also seems curious that a national electronics service company like Thompson, which according to Mr. Bourque did three hundred million dollars worth of business a year, suddenly realized that it might have trouble servicing customers, despite the fact that a central feature of its position in negotiations was that the Bourque Company give up exclusive servicing rights. Indeed, Thompson was continuing to insist on this point in the new offer, even though according to Mr. Bourque the new offer was prompted by Thompson's fears that it would not be able to service customers. Taking Mr. Bourque's evidence as a whole, we do not find his attempts to divorce the lay-off from the offer either credible or consistent with his own testimony.

26. On the other hand, it is clear that labour costs were an issue for Mr. Bourque from the beginning of negotiations on May 8th. Both the Bank and Thompson wanted some evidence of the Company's future profitability which Mr. Bourque considered included reducing labour costs. The offer was clearly directed at such a reduction, which Mr. Bourque apparently hoped would satisfy his creditors and make the Company more attractive to potential investors. The timing of the lay-off and the offer strongly suggests that the lay-off was intended to make employees more receptive to the offer by providing them with a taste of unemployment. It was also apparent that at least the Toronto employees might require some significant inducement to accept the offer, given the nature of the concessions involved, and the context of the strike and the first contract proceedings. We conclude that the layoff was used as a lever to induce employees to agree to the concessions put to them four days later.

27. We do not find that the fact employees were laid off in other locations in Canada points us to a different conclusion, as the offer was put to these employees as well. Whether or not these events amount to violations of the applicable legislation in the provinces in which those facilities were located is not a matter within our jurisdiction; in Ontario, however, the layoff amounted to a suspension of work or a refusal to continue to employ a number of employees with a view to inducing them to agree to changes respecting terms or conditions of employment. In other words, both the requisite elements of a lockout were present, and that lockout was unlawful by virtue of section 40a(13). As a result, we find the Company called or authorized an unlawful lockout, and Mr. Bourque, an officer, official or agent of the Company counselled, procured, supported or encouraged an unlawful lockout contrary to section 75. In addition, Mr. Bourque's direction to Mr. Akala to lay off employees in this context violated section 76.

28. We now turn to the union's allegations that these events also violate sections 70 and 66(c). Those sections provide as follows:

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

...

(c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

29. After the first contract direction issued on May 7, 1990, employees, through their union, were entitled to have their collective agreement settled by interest arbitration. It was clear that Mr. Bourque wished to have employees agree upon their working conditions, rather than having those conditions determined by an arbitrator. To induce them to agree, we have concluded above, he arranged for a layoff.

30. There are few things more coercive or intimidating in an employment context than the threat of unemployment. As a result, we find that by laying off employees so they would agree to reduced working conditions and thus forego first contract arbitration, the respondents sought by intimidation or coercion to compel employees to refrain from exercising rights under this Act. For similar reasons, we find the respondent violated section 66(c). We do not find it necessary to consider the complainants' other allegations under section 66 as they do not add to our understanding or analysis of the respondents' conduct, nor do they affect any potential remedy.

31. We turn next to the complainants' allegation that the Company was bargaining directly with employees, and that as a result Mr. Bourque's offer of May 14th was a violation of section 67. Section 67 provides as follows:

67.-(1) No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any per-

son or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

32. It is well established that attempts to negotiate directly with employees who are represented by a certified bargaining agent will violate section 67. (See, for example, *Globe Spring & Cushion Co. Ltd.*, [1982] OLRB Rep. Sept. 1303 and *A. N. Shaw Restoration*, [1978] OLRB Rep. May 393.) In the latter case, the Board commented on the scope of section 67 as follows:

This section prohibits employers from bargaining directly with employees represented by a bargaining agent, and rival unions from bargaining on behalf of such employees.

The existence of this well-established principle of exclusivity of bargaining rights means that employers must be circumspect when communicating with employees represented by a bargaining agent, especially when these communications occur during the course of negotiations. The need for circumspection on the part of employers, however, does not mean that all communications between employer and employees are prohibited. Section 56 [now section 64] of the Act, prohibiting employer interference with the formation, selection or administration of a trade union or the representation of employees by a trade union, expressly provides that this very general prohibition does not 'deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence'. Where communications occur between employer and employees during negotiations, the Board must draw a line dividing legitimate freedom of expression from illegal encroachments upon the union's exclusive right to bargain on behalf of the employees. The line is not an easy one to find, and can only be discovered by asking whether such communications in reality represent an attempt to bargain directly with the employees. If employer communications can be characterized in this manner, they must be regarded as unduly influencing employees and, therefore, falling outside the protection provided to freedom of expression in section 56. Once outside this protected area, such communications can be characterized as a violation of section 59 of the Act, and also a violation of the duty to bargain in good faith if they serve to undermine the viability of the bargaining agent.

33. In this case, as in *Globe Spring, supra*, it cannot be said that Mr. Bourque was simply explaining his position, clearing up a misunderstanding or otherwise lawfully exercising the Company's right to freedom of speech. There is no question that Mr. Bourque put an offer to Mr. Di Meo and Mr. Glass, which he hoped employees would accept, and asked Mr. Glass to communicate their response. Mr. Bourque initially stated that he did not recall asking Mr. Glass to call him back after he had spoken to the other employees. In this regard, we prefer the evidence of Mr. Glass, not only because Mr. Bourque was a less credible witness generally, but also because he admitted in cross-examination that he may have put it to Mr. Glass that the Bank and Thompson needed an answer by noon the next day.

34. What we find more problematic in this case is that Mr. Di Meo and Mr. Glass were members of the union's negotiating committee. We do not preclude the possibility that an approach to members of a negotiating committee who are also bargaining unit members may be appropriate in some circumstances. However, in this case, we conclude that Mr. Bourque knew very well that he should have put the offer to Mr. Feil, the union spokesperson in negotiations, and that he was not approaching the two employees in their capacity as members of the negotiating committee.

35. Mr. Bourque himself testified that he was looking for Mr. Feil's number because Mr. Feil had been "negotiating on behalf of the union". In fact, that was his ostensible reason for calling Mr. Di Meo and Mr. Glass. However, instead of proceeding to call Mr. Glass for Mr. Feil's number when it became apparent Mr. Di Meo did not have it, Mr. Bourque launched into his proposal. When Mr. Bourque was rebuffed by Mr. Di Meo, he called Mr. Glass and once again put his proposal to him, rather than pursuing Mr. Feil. Indeed, the evidence indicates Mr. Bourque's

efforts to contact Mr. Feil were perfunctory at best, and mainly served the purpose of providing a vehicle for calling the two employees so that he could put his proposal to them. This is confirmed by the fact that after Mr. Glass agreed to poll employees, Mr. Bourque made no attempt whatsoever to contact Mr. Feil. He did attempt to call Robert White at some point at the Canadian Labour Congress convention, without success. However, he had no explanation for why he did not try and call Mr. Feil at the convention, and contacting Mr. White made little sense in the circumstances.

36. Similarly, Mr. Bourque testified that he called Mr. Glass because Mr. Di Meo told him Mr. Glass might have Mr. Feil's phone number. He did not say he called Mr. Glass to put a proposal to him as a member of the negotiating committee. Nor did he ask Mr. Glass to accept or reject the offer on behalf of employees in his capacity as a negotiating committee member, but rather to poll other employees and provide him with their response.

37. Even assuming that Mr. Bourque sincerely wished to contact the appropriate union officials and was unsuccessful because of the convention, (a conclusion which we have by no means reached), it was still improper for Mr. Bourque to be negotiating directly with bargaining unit members. Under section 67, Mr. Bourque was required to negotiate solely with the union, regardless of whether that might be inconvenient or whether the matter involved was urgent.

38. In conclusion, we find that Mr. Bourque contacted members of the bargaining unit to put to them a proposition with respect to reduced working conditions and to obtain their acceptance, a proposal that should have been made to the union in the person of Mr. Feil. As a result, we conclude that both respondents breached section 67 of the *Labour Relations Act*.

39. Section 64 provides as follows:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

40. By attempting to negotiate directly with employees rather than the union, the respondents also interfered with the representation of employees by the union contrary to this section. It would be difficult to think of a function more integral to a certified bargaining agent than the negotiation of working conditions. By circumventing the complainants and making offers to employees, the respondents interfered with the complainants' representations of not only Mr. Di Meo and Mr. Glass, but all those employees whom Mr. Bourque asked Mr. Glass to poll.

41. Finally, the complainants allege that the decision to put the Company into bankruptcy was motivated by a desire to punish employees, to prevent them from exercising rights under the *Labour Relations Act*, or to rid the respondents of the union.

42. There is no doubt that the timing of this decision is troublesome. However, there are a number of facts which support the respondents' position that the bankruptcy was caused by financial insolvency. In the first place, it was not disputed that the Company had massive debts. The evidence indicates that the Company owed over one million dollars to the Bank and Thon, alone. It was apparent that neither of these two major creditors were prepared to allow the Company any more latitude. The calling in of the Bank's loan on May 8th precipitated a financial crisis, which Mr. Bourque attempted to avert by negotiations with the Company's creditors and a potential investor. There was no indication that the relationship between the Company and the Bank was

less than arm's length or that Mr. Bourque somehow engineered the Bank's demand on the loan. When it became apparent by May 16th that Mr. Bourque could not work out a deal with the Bank, Thompson, General Electric Canada Inc. or some other capital source, the Company was no longer viable. There was no suggestion that the bankruptcy proceedings were fraudulent, or that the court's determination of insolvency was incorrect.

43. We also find it difficult to believe that Mr. Bourque would put the entire Company into bankruptcy to punish Toronto employees or prevent them from exercising their rights. The Company employed approximately one hundred people of whom only fifteen worked in Toronto. There was no suggestion that the Toronto location was particularly important or pivotal in the Company's structure. We note that Montreal employees were also unionized, and there was no evidence Mr. Bourque had been unable to coexist with that union. While the evidence shows that Mr. Bourque was prepared to ignore the rights of employees and the complainants when they were in his way, there was no indication of the kind of fervent anti-union feeling which would suggest a reason why he might be prepared to sacrifice the entire Company for the purpose of penalizing Toronto employees or ridding himself of the complainants at the Toronto location.

44. There is no doubt that labour costs were an element of the financial negotiations. However, we do not find that either the refusal of the Toronto employees to agree to Mr. Bourque's offer, or the subsequent unlawful lockout applications played any role in the decision to initiate the bankruptcy proceedings. Indeed, to the extent that labour costs were a factor in the financial discussions, we note that over eighty-five per cent of the Company's employees nationally were prepared to either accept or entertain Mr. Bourque's offer. There was no suggestion that labour costs in the Toronto location were particularly high, or critical to any financial solution for the Company's problems. We conclude on the balance of probabilities that the Company went bankrupt because of its debts, and that it would have done so regardless of what the Toronto employees did or did not do. Quite simply, the creditors pulled the financial plug and the Company went down the drain. Mr. Bourque may be a poor businessman, as his counsel acknowledged, but that is not a violation of the *Labour Relations Act*. As a result, we do not find that the decision to initiate bankrupt proceedings was tainted by an improper motive.

45. This leads us to the matter of remedy. The complainants have named both the Company and Mr. Bourque personally as respondents, and asked that we find both of them liable for the violations of the *Labour Relations Act* and subject to the appropriate remedies. Counsel for the respondent Pierre Bourque resisted this request, arguing primarily that Mr. Bourque was acting at all times in his capacity as an officer of the Company and that Board findings of personal liability should be limited to exceptional circumstances.

46. The Board has previously said that an individual may be personally liable for unfair labour practices under the Act. In *Sunnylea Foods Limited*, [1981] OLRB Rep. Nov. 1640 the Board commented as follows:

38. The respondents Sunnylea and Jacob Zonneveld, based on our findings above, are directed to compensate Robert Berton with interest for the monetary losses experienced because of his unlawful treatment. Authority for this ruling going against Zonneveld personally can be found in the general wording of sections 64, 66 and 89 of the *Labour Relations Act*. Sections 64 and 66 directly refer to persons acting on behalf of any employer and section 89 contains equally broad language. With the greatest of respect to my colleague, Mr. Ronson, I am not aware of the policy to which he refers. I can conceive of a number of situations where it would be appropriate to name the person responsible for the unfair labour practice where that person is primarily in control of the employing entity or other organization. It is my view that this is such a case. Jacob Zonneveld, for all intents and purposes, is Sunnylea and Sunnylea is no longer in business. No matter how mild the remedy, it is one that the complainant should be able to pursue against the

ongoing activities of Mr. Zonneveld. Indeed, had the complainant's core allegations been established, a remedy confined to Sunnylea may have been quite ineffective. If the potential for personal liability is not understood in the labour relations community, I would hope this decision sheds some light on the matter.

See also *Heritage Manor Rest Home*, [1983] OLRB Rep. March 385, *Daynes Health Care Limited*, [1985] OLRB Rep. March 387, *Termarg Food Services Limited*, [1985] OLRB Rep. Mar. 516, *Doyles Tavern*, [1985] OLRB Rep. May 662, *Forintek Canada Inc.*, [1986] OLRB Rep. April 453, *Walter Tool and Die Ltd.*, [1986] OLRB Rep. Aug. 1167 and *Peralta Foods*, [1987] OLRB Rep. Sept. 1162.

47. More recently in *Nepean Roof Truss Limited*, [1988] OLRB Rep. Jan. 61 the Board addressed a similar argument with respect to individual respondents acting in their capacities as corporate officials:

The clear wording of those sections, [sections 64 and 66] particularly where they state "no employer...or person acting on behalf of an employer..." gives the Board jurisdiction to find that an individual has breached the section, including an individual other than one working for a party unrelated to the corporate employer. We see nothing in that phrase which suggest that a person "acting on behalf of an employer" cannot be an owner or officer of the corporate employer. We are not prepared to read into that phrase a limitation on finding liability that depends on the identity of the employer of the "person acting on behalf of", as suggested by counsel for the respondents. To read such a restriction into that section is neither consistent with the language used therein, nor consistent with sound labour relations policy. These sections are designed to protect the ability of unions and individuals to exercise the rights afforded them under the *Labour Relations Act*. To read in the limitation suggested by counsel for the respondents would be to allow individual officers or owners of a corporate respondent to escape personal liability for any wrongdoing committed by them. In circumstances where, for example, the corporate entity is a shell corporation or a corporation without significant assets, individuals could in practice breach these sections with impunity. Given the clear language, it remains open to the Board to find that an individual has breached the Act, where it is so pleaded and is borne out by the facts (having regard to the section claimed to have been breached).

The distinction urged upon us is particularly unhelpful in circumstances like those here where Mr. Bourque directed and controlled the Company's operations and it is Mr. Bourque himself who made the decisions or took the actions which we have found violated the Act. In other words, this is not a case of vicarious liability. We also note that all of the sections of the Act which we have determined were contravened by Mr. Bourque include phrasing similar to that of sections 64 and 66, or other words that indicate they can be contravened by individuals.

48. The Board has also moved away from the proposition that a finding that individuals have breached the Act is limited to special or exceptional circumstances. In *Nepean Roof Truss. supra*, the Board said:

It may not be necessary in a given case for the Board to decide whether an individual has breached the Act. But where the Board does find it necessary to determine that issue, whether or not the Board will find individuals to have breached the Act does not depend on special or exceptional circumstances. It depends only on whether the persons are alleged to have breached a particular section of the Act, and on whether the evidence establishes their breach of that section. The Board of course retains a discretion, notwithstanding the breach, over the appropriate remedy, if any, to be directed against an individual, or against a corporate employer for that matter, and the exercise of this discretion depends on whether the Board considers it appropriate in the circumstances, in the interests of promoting harmonious labour relations within the Province.

49. As described above, we have found that both respondents breached a number of sections of the *Labour Relations Act*. In light of the Board's jurisprudence and the evidence before us

we see no reason to insulate Mr. Bourque from liability with respect to his violations of the Act. Indeed, the Board has previously commented on the particular appropriateness of individual liability where the Company involved is bankrupt or an empty shell for one reason or another (see *Sunnylea Foods, supra*, *Daynes Health Care, supra* and *Nepean Roof Truss, supra*.) There was also no suggestion that the Company was not liable for the conduct of Mr. Bourque as its President. As a result, we find both respondents jointly and severally liable for the orders set out below.

50. We note in passing that we have not commented on counsel's argument that section 89(5) does not apply to Mr. Bourque as the evidence was not so evenly balanced that we found it necessary to have recourse to a burden of proof test in the course of making our findings.

51. However, we are still left with the problem of the appropriate remedies in these circumstances where the Company has gone bankrupt. Our basic concern is that we have no knowledge of the current status of the Company. Although a notice of hearing was sent to the trustee in bankruptcy after the Board was notified of his appointment, no one appeared on his behalf. As a result, we do not know, for example, whether any attempt is being made to keep the Company operational or whether it is being dissolved, a matter which obviously affects a remedy such as reinstatement. Neither do we have the benefit of any submissions with respect to the effect of section 69 of the *Bankruptcy Act* or the impact of a Board order in these circumstances.

52. We therefore direct the relief set out below at this time. However, we remain seized of the matter of remedy generally. If it appears that an additional remedy such as reinstatement is appropriate, either party may bring the matter back on before us. In addition, we remain seized of the quantum of remedy in the usual manner.

53. In summary, the Board declares that the respondents have violated sections 64, 66, 67, 70, 75, and in the case of Mr. Bourque, section 76. Pursuant to section 89, the Board orders:

- a) that the respondents forthwith pay to all employees in the bargaining unit on May 9, 1990, compensation for their losses suffered as a result of the respondents' violations of the Act, together with interest in accordance with the Board's practice note;
- b) that the respondents forthwith pay to the complainants compensation for their losses suffered as a result of the respondents' violations of the Act, together with interest in accordance with the Board's practice note;
- c) that a copy of this decision be sent by the Board to each employee in the bargaining unit on May 9, 1990. To facilitate this order, the respondents are directed to furnish the Board with employees' names and addresses; and
- d) that the respondents are jointly and severally liable for these orders.

DECISION OF BOARD MEMBER R. W. PIRRIE; October 2, 1990

1. I dissent from the majority's decision.

2. I did not find Mr. Bourque to be evasive or untruthful as a witness. In my view his testimony was no more self serving than that of the union's witnesses. His testimony concerning the demise of Bourque Consumer Electronics was concise and an entirely plausible explanation of

events as they occurred. That Mr. Bourque could not precisely recollect all of the facts that occurred over a hectic and difficult period of time does not, in my view, make him an untruthful witness.

3. With respect to the majority's decision that the lay-off on May 1, 1990 was an unlawful lockout - I disagree. I interpret the evidence that the lay-off was just that - a lay-off. A business may have all manner of work orders to perform, and its employees may be endeavouring to sell the services of that business, but if the net result of the activity is not profitable and the company is unable to meet its payroll obligation, a lay-off of employees - particularly employees right across the country - is a perfectly logical decision. Furthermore, I see the action by Mr. Bourque on behalf of the company in the following week to also be a logical business action in response to new circumstances. He was endeavouring to salvage the company.

4. With respect to the majority's decision that Mr. Bourque violated section 70 and 66(c) of the Act - I disagree. As stated above, I do not interpret the evidence as indicating Mr. Bourque laid off his employees in order to coerce, intimidate or compel them to refrain from exercising their rights under the Act. In response to a new set of circumstances he made an attempt on behalf of the company, to salvage the company. Certainly if he was attempting to coerce, intimidate and compel his employees, he was no more successful than he was at running his business.

5. With respect to the majority's decision that Mr. Bourque's action on May 14, 1990 violated section 67 of the Act - I disagree. Yes Mr. Bourque spoke to Messrs. Di Meo and Glass. Yes he outlined a proposition to them, yes he asked Mr. Glass to talk to the other employees, yes he asked Mr. Glass to get back to him. However, in the same telephone conversations Mr. Bourque prefaced the discussions by asking for the phone number and whereabouts of Mr. Fiel, the CAW's Business Agent, and in the case of Mr. Glass terminated the conversation by indicating he would endeavour to reach the CAW officials who were attending the CLC convention in Montreal. I think it is also of significance that both Messrs. Di Meo and Glass were members of the union's bargaining committee.

6. Mr. Bourque testified that he attempted to contact Mr. White, President of the CAW, in Montreal, with whom he had spoken earlier. He reached a Mr. Gortall of the CAW. Mr. Gortall advised him that Mr. White was not available. Mr. Bourque testified he identified himself and indicated an urgency to speak with Mr. White. Neither Mr. White, nor Mr. Fiel at Messrs. White or Gortall's direction returned Mr. Bourque's telephone call. My interpretation of the evidence is that for all of his lack of sophistication in labour relations matters, Mr. Bourque on behalf of the company was not attempting to negotiate with Messrs. DiMeo and Glass. Mr. Bourque fully recognized he would need to, and indeed attempted to deal with the CAW's officials. That they chose not to return Mr. Bourque's telephone call does not detract from the fact he endeavoured to work through the union.

7. Lastly, and most important, I disagree with the majority's decision that holds both respondents, Bourque Consumer Electronics and Mr. Bourque jointly and severely liable for the remedies that flow from the directions they issue. As noted above, I do not agree that the Act has been violated in the way the majority describes. However, even if I did agree the Act had been offended, I could not agree Mr. Bourque should be held personally liable. I view Mr. Bourque's actions at all times as being taken in the name of, and in the interest of the company. To place those actions in the same league as those of the principals of *Nepean Roof Truss* overstep the bounds of reasonableness.

1473-90-FCA Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880, Applicant v. Canada Building Materials Company, Respondent

Evidence - First Contract Arbitration - Practice and Procedure - Board not admitting pleadings from unfair labour practice complaint involving same parties - First Contract arbitration concerned with fair and reasonable terms and not conduct of parties during negotiations or certification - Award should reflect terms parties would have reached had bargaining not broken down - Board assuming parties would make agreement comparable to others in same industry and geographic area - Board having regard to previous bargaining relationship and collective agreements between employer and another union - Board having regard to market conditions in unionized sector of industry in geographic area competition - Award making allowances for fact employer must compete with non-unionized operations - Award including retroactivity but not signing bonus

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *W. A. Correll* and *B. L. Armstrong*.

APPEARANCES: *Michael A. Church, Linda Huebscher, Tom Baldwin, Gary Kitchen, Frank Bietex and Dan Peltier* for the applicant; *James C. Vair, Barry Hutton, Dave DeBruine and Bert Beraldo* for the respondent.

DECISION OF THE BOARD; October 5, 1990

1. This is an application filed pursuant to section 40a(4) of the *Labour Relations Act* ("the Act") arising out of the request of the parties that the Board arbitrate the settlement of the first collective agreement.

2. Canada Building Materials Company ("CBM") manufactures and supplies Ready-Mix concrete, concrete block and calcite brick and aggregates. It carries on business throughout the province of Ontario and operates a number of "ready-mix" and "block" plants at various locations in the province. This application relates to CBM's plant in Chatham, Ontario. This plant includes a "ready-mix" and "block" operation. At full employment during the summer months there are approximately twenty-one employees in the bargaining unit. The majority of these employees are drivers.

3. Before we address the merits of the items which remain in dispute, and the criteria which are to be applied in resolving those items, we wish to address as a preliminary matter an issue raised in the materials filed with the Board.

4. In the submissions filed by the Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 880 ("Teamsters") pursuant to Practice Note 19, it is stated:

PRELIMINARY NOTE

The Union reserves the right to refer to and rely upon the extensive pleadings and documentation filed in respect to the recent proceedings before the Board involving the parties in this case. Reference may be made to a Complaint under Section 89 of the Act (Board File No. 0995-90-U) and an Application for Direction for First Collective Agreement to be Settled by Arbitration under Section 40a of the *Act* (Boar File No. 1252-90-FC).

The Union appreciates that the parties have resolved all of their differences in respect to the aforementioned proceedings before the Board. However, as the Board can readily appreciate, the parties spent considerable time, effort and expense in preparation of the pleadings and materials utilized in respect to the aforesaid cases. The Union is, of course, prepared to stand by and honour the settlement of all issues reached to date with the Employer in this case. How-

ever, the Union respectfully reserves the right to refer to certain pleadings of fact and documents contained in the aforementioned material which it believes are not in dispute between the parties. The Union believes that it is essential for the Board to become familiar with the background of the history, negotiations and issues in dispute between the parties in this case before the Board can hope to appreciate and address the remaining issues in dispute between the parties. Accordingly, the Union reserves the right to refer to the aforementioned Board Files.

5. In its submissions, CBM objected to the filing of that material stating that it was not relevant and inadmissible. Counsel submitted that the trade union was "attempting to introduce information which would result in the Board considering bargaining conduct when settling the terms of the first agreement". It asserted that "such conduct is irrelevant and such considerations are inconsistent with the scheme of first contract arbitration."

6. We note that the Teamsters' complaint under section 89 of the Act (Board File 0995-90-U) was withdrawn. We further note that the parties mutually agreed that the Board direct the settlement of the first collective agreement by arbitration under section 40a of the Act after their negotiations failed to result in a collective agreement (Board File 1252-90-FC). There has not been any litigation of the facts asserted by the trade union (but disputed by the employer) in either of those two files.

7. We accept the submissions made on behalf of CBM that conduct of the parties (either the union or the employer) during the negotiations prior to arbitration is not relevant. Although such conduct is obviously relevant to determinations made by the Board under section 40a(2), it is not relevant to the arbitration of the first collective agreement.

8. In arbitrating the first collective agreement the Board is concerned with the contents of that collective agreement and not with the conduct of the parties. In arbitrating the first collective agreement the focus is on what are fair and reasonable terms and conditions to be contained within that collective agreement. The arbitration of a first collective agreement is not designed to penalize or reward the conduct of either party. In our view, the behaviour of the parties during negotiations (or during certification for that matter) should not influence or affect the contents of the arbitrated collective agreement.

9. When Bill 65, An Act to amend the Labour Relations Act (in respect of first agreement arbitration), received first and second reading, section 40a(15) read as follows:

"In arbitrating the settlement of a first collective agreement under this section, matters agreed to by the parties, in writing, shall be accepted without amendment and account may be taken of,

(a) whether the parties have made reasonable efforts to reach a collective agreement;

(b) the terms and conditions of employment, if any, negotiated through collective bargaining for employees performing the same or similar functions in the same or similar circumstances as the employees in the bargaining unit; and

(c) such other matters as the Board or Board of Arbitration considers relevant to a fair and reasonable settlement."

10. Before the Standing Committee on Resources Development (when that Committee reviewed Bill 65) this clause received considerable attention. A number of submissions were received from both employer and trade union interests alike advocating the deleting of this provision because of the view that retribution or punitive measures ought not to affect the arbitration of a first collective agreement.

11. In our view, the fact that the section was substantially amended (as evidenced by the

current provision in section 40a(17) indicates that the legislature recognized that conduct or "fault" has no place in the arbitration of a first collective agreement. For these reasons we have not considered either of the parties' pleadings in Board Files 0995-90-U and 1252-90-FC.

12. We turn then to the merits of the items in dispute. For purposes of the proceedings before us, the parties agreed that the *only* items which remained in dispute were Clause 15: Hours of Work, Clause 17: Pension (amounts of contribution only) and Schedule "B" - Wage Rates and Classifications. The parties were also in dispute in respect of the issue of retroactivity. At the hearing the parties agreed on a number of matters. We find it unnecessary to set out those agreements before us or the many items upon which the parties agreed prior to the hearing. It is sufficient to note that those matters agreed upon shall be included in the collective agreement together with the matters which have been the subject of arbitration before us.

13. In our view section 40a is intended to apply in circumstances where the normally contemplated process of collective bargaining has broken down. The object of arbitrating the first collective agreement after a direction has been issued by the Board is therefore to put such terms and conditions in that first collective agreement as the employer and the trade union would have achieved had the process of collective bargaining not broken down. What collective agreement terms could reasonably be expected to have resulted if the parties' negotiations had not broken down? In answering that question we must assume that the parties would not have negotiated a collective agreement which was not "fair and reasonable" (although we recognize that the parties' definition of that term may differ). We view our role and arbitrating this agreement as remedial.

14. In *Teamsters Local Union 419 and Crane Canada Inc.* (an arbitration by a "consensual" Board of Arbitration under section 40a(3) of the Act) the Board wrote:

In our view, first agreement boards of arbitration should guard against any temptation to make overly generous awards, rich in "breakthrough" provisions which are normally achieved only through years of collective bargaining. Such an approach would tend to encourage recourse to first agreement arbitration as a substitute for legitimate negotiation and compromise that must be the essence of free collective bargaining. It might also have the deleterious effect of further souring the perspective of an employer whose view of collective bargaining may already be unduly cynical. By the same token, however, the terms of an arbitrated first agreement should not be so niggardly as to undermine the confidence of employees in the process of collective bargaining or prompt employers to adopt hard bargaining positions in the belief that their conduct, and the prospect of first agreement arbitration, contain little downside risk. Paradoxically, first agreement arbitration awards should be perceived by unions as sufficiently lean to dissuade them from lightly turning to it as a substitute for bargaining, and should at the same time be seen by employers as sufficiently generous to cause them to realize that it may be in their own best interest to freely fashion the terms of a first collective agreement in face-to-face bargaining with the union. In the final analysis, the measure of the success of a first agreement arbitration provision within a labour relations Act or a labour Code is the infrequency, and not the frequency, of its ultimate application.

The task of a board of arbitration charged with establishing the terms of a first collective agreement under a statutory provision such as section 40(a) of the Ontario Labour Relations Act is therefore extremely delicate. It must avoid granting contract terms so expansive as to convert the first agreement arbitration forum into a promised land that frees unions from the obligations and risks inherent in a market-sensitive system of free collective bargaining. At the same time, as has been recognized by the three leading labour relations boards in Canada, boards of arbitration must be cognizant of the role they must play as statutory tribunals within a legislative scheme whose general purpose is to foster the process of collective bargaining.

15. The Board went on to refer to the oft-quoted decision of then Chairman Weiler in the decision of the British Columbia Labour Relations Board, in *London Drugs Ltd.*, [1974] 1 Canadian LRBR 140, at page 147:

As regards the language and structure of the collective agreement, the Board does not believe that s. 70 should be used to achieve major breakthroughs in collective bargaining. Instead, we will try to settle on terms which reflect a fairly general consensus of what should be in a collective agreement, as tailored to the requirements of the operation before us. We will leave it to future negotiations between these parties to develop any innovations in that language. However,[w]e intend to see that the collective agreements we settle under s.70 are sufficiently attractive to the employees affected by them that they will think twice before applying to rid themselves of their union representatives and thus forfeiting the agreement....

See also *Nepean Roof Truss Limited*, [1986] OLRB Rep. July 1005; *Burlington Northern Air Freight Canada Ltd.*, [1986] OLRB Rep. Oct. 1327; *Egan Visual Inc.*, [1986] OLRB Rep. Dec. 1687 and *Venture Industries*, [1990] OLRB Rep. July 809, decision not yet reported.

16. In this case our arbitration of this first collective agreement is somewhat unique because prior to the certification of the Teamsters, CBM had a collective bargaining relationship with the Canadian Brotherhood of Railway, Transport and General Workers (CBRT). Indeed, the employees who will be covered by this collective agreement have been unionized and subject to a series of collective agreements and bargaining agents for the past twenty-five years. The Teamsters displaced the CBRT in October 1989.

17. The arbitration of the first collective agreement is generally designed to ensure that the employer, the employees and the trade union can experience and assess the value of a collective bargaining relationship for a period of time. In this case, because the Teamsters displaced the CBRT, that factor, although still relevant must be viewed from a different perspective. The employer and the employees already have a lengthy experience working within a collective bargaining relationship. They have not however had that experience with the Teamsters as a representative of the employees. One way in which this different perspective must be taken into account is through due recognition of the collective agreement which existed at the time the Teamsters were certified.

18. In determining what collective agreement could reasonably be expected if the parties' negotiations had not broken down we can assume that these parties would have made an agreement comparable to others in the same industry and geographic area. In this case although the parties appeared to agree that we should impose a "comparable" agreement, they were unable to agree upon the appropriate geographic area within which comparisons should be made.

19. In general terms the employer asserted that the appropriate geographic area was Chatham, Blenheim, Wallaceburg, Tilbury and Dresden for its ready-mix operations, and certain block plants east of Chatham (in London, Oshawa, Maple, etc.) for its block plant operations. The trade union on the other hand asserted that the appropriate geographic area for both the ready-mix and block operations was much broader and should include Sarnia and Windsor. In respect of the block plant operation the Teamsters submitted that certain employers which carry on both ready-mix and concrete block operations in Belle River and Leamington were the most appropriate comparators.

20. In our view unqualified acceptance of either of these geographic areas for purposes of comparison would not result in a collective agreement that could reasonably be expected to have resulted if there had not been a breakdown in the process of collective bargaining. Thus, although we have considered all of the collective agreements which have been freely negotiated between this union (and other Teamster locals) within this industry, as well as the prevailing conditions of work and rates of pay at CBM's other locations (both unionized and not unionized), we have made due allowance for a variety of other factors including the economic realities of the industry, the skill levels of the employees within it, CBM's overall operations and the place of CBM's Chatham operations within CBM overall operations, and as noted, the existing, expired collective agreement

between CBM and the CBRT. Although the Board is by no means clairvoyant it is our view that had these parties properly considered these various factors and successfully concluded a collective agreement it would have contained the following terms with respect to the items which remained in dispute. We therefore direct that these clauses be included in the first collective agreement.

Hours of Work

ARTICLE 15 : HOURS OF WORK

- 15.1 The employees to whom this Agreement applies shall be paid wage rates as set out in Schedule "B" attached and forming an integral part of this Agreement.
- 15.2 In the event of a "Temporary" transfer to another job, the employee shall be paid at his own wage rate or the prevailing wage rate, whichever is the greatest.
- 15.3 The following shall not be construed as a guarantee of hours of work per day or per week:
 - (i) The normal hours of work for the Ready Mix Division will be eight and one half (8 1/2) hours per day Monday to Friday.
 - (ii) The normal hours of work for the Block Division will be nine (9) hours per day.
 - (iii) Time and one half (1 1/2) the basic rate shall be paid for all hours worked by employees in the Ready Mix Division in excess of eight and one half (8 1/2) hours per day, or 42.50 hours per week, Monday to Friday.
 - (iv) Time and one half (1 1/2) the basic rate shall be paid for all hours worked by employees in the Block Division in excess of nine (9) hours per day, or 44 hours per week, Monday to Friday.
 - (v) All work performed by employees on Saturday shall be paid at the rate of time and one half (1 1/2) the employees' basic rate.
 - (vi) All work performed by employees on Sunday shall be paid at the rate of double time (2 X) the employee's basic rate.
 - (vii) Double time the basic rate shall be paid for all hours worked by employees in the Block Division in excess of fifty-five (55) hours per week. Failure of an employee in the Block Division to work fifty-five (55) hours per week shall not disentitle such employee from nevertheless receiving double time the basic rate for all work performed by such employee on Sunday.
- 15.4 Work may be scheduled in shifts, provided the day shift commences not earlier than 6:00 A.M. on weekdays and 7:00 A.M. on Saturdays, and not later than 12:00 noon, with other shifts as the Company may determine, provided that all shift work performed between the hours of 3:30 P.M. and 6:00 A.M. weekdays, and 3:30 P.M. and 7:00 A.M. on Saturdays, shall be paid for at the premium rate of twenty-five cents (\$0.25) per hour.
- 15.5 Any employee who is requested to report for work and is not provided with at least four (4) hours work shall receive a minimum of four (4) hours pay at his basic rate. He must, however, remain at work and perform any duties required of him if requested to do so.
- 15.6 The provisions of 15.5 hereof shall not apply in the event of an employee who has been informed at the conclusion of his working day or shift not to report until advised to do so by the Company.

- 15.7 Employees may take a one-half (1/2) hour unpaid lunch period, designated by the supervisor, between the fourth and sixth hour of work on any day.
- 15.8 Should the Company create an occupational classification for which no rate is herein provided, the hourly rate shall be determined by the Company for a period not exceeding thirty (30) calendar days, and thereafter shall be as agreed upon between the parties.

Article 17: Pension

- 17.1 The parties hereto agree that it is desirable to have a Group Registered Retirement Savings Plan (Group R.R.S.P.) instituted for employees coming within the bargaining unit, and the employees hereby agree and authorize the Company to deduct from their pay an amount equal to thirty cents (\$0.30) per hour for each hour worked during the term of this Agreement, to be deposited in a separate fund, maintained by the Company which shall likewise contribute an equal sum to the said fund during the life of this Agreement.
- 17.2 The Group R.R.S.P. as provided for in Article 17.1 shall be effective on November 1, 1990.
- 17.3 For new employees, the provisions outlined in Article 17.1 shall be in effect from the 1st day of the month following ninety (90) days of employment.
- 17.4 Employee Group R.R.S.P. statements will be provided for each year.

Schedule B

Wage Rates and Classifications

Ready Mix Division

<u>Classification</u>	Nov.1 <u>1989</u>	Nov.1 <u>1990</u>	May 1 <u>1991</u>
Ready Mix Driver	13.40	14.40	15.40
Aggregate Truck Driver	13.40	14.40	15.40
Yardman/Loader Operator	13.15	14.15	15.15
Batcher	13.15	14.15	15.15
Mechanic	16.10	16.90	17.70

The starting rate for the above-noted classifications shall be one dollar (\$1.00) per hour less than the classification rate during the probationary period.

Block Division

<u>Classification</u>	Nov.1 <u>1989</u>	Nov.1 <u>1990</u>	May 1 <u>1991</u>
Labourer	13.15	14.15	15.15
Inside/Outside			
Lift Truck Operator	13.15	14.15	15.15
Cuber	13.40	14.40	15.40
Machine Operator	13.65	14.65	15.65
Block Truck Driver	13.40	14.40	15.40

The starting rate for the above-noted classifications shall be one dollar (\$1.00) per hour less than the classification rate during the probationary period.

The following applies to employees in both the Ready Mix Division and the Block Division:

At the discretion of the Company a classification to be known as Lead Hand may be established for certain of the above job classifications. Lead Hands will be entitled to a premium of fifty cents (\$.50) per hour above their classified rate.

The Operator of a Semi-Trailer, Semi-Float and Tandem Trailer shall receive an additional ten cents (\$.10) per hour above the driver rates.

Retroactivity

21. We have exercised our discretion under section 40a(18) and have ordered retroactivity. This retroactivity is reflected in the wage grid. Employees are to be paid the November 1, 1989 rates for all hours worked from November 1, 1989 to November 1, 1990. We do not view it appropriate to award a "signing-bonus" as requested by the Teamsters.

22. In our view the terms of this award will place CBM, the employees and the Teamsters in a position which they might reasonably have been expected to achieve had the parties been successful in their bargaining for a first collective agreement. We have attempted to have due regard to market conditions within the unionized sector of this industry in the geographic area within which CBM must compete (including its own unionized operations) while making certain allowances for the fact that CBM must compete also with certain other non-unionized operations in the area (including its own non-unionized operations within a 25 mile radius of Chatham.) In our view the members of this bargaining unit could not expect to achieve parity or even near parity with CBM's unionized operations in Sarnia or Windsor in the first round of bargaining even if the process of collective bargaining had not broken down. On the other hand, neither could the members of the bargaining unit be expected to accept less, or increases that are only "marginally" better than those given to employees at CBM's non-unionized operations in Blenheim and Wallaceburg shortly after the Chatham employees went on strike. The same considerations hold true for our award in respect of the hours of work.

23. Finally, we note that if any of the provisions which we have arbitrated prove to be unsatisfactory, it is open to the parties to revise them by mutual consent at any time, as permitted by section 52(5) of the Act.

24. We will remain seized to resolve any disputes that may arise between the parties respecting the interpretation or implementation of the terms of this award.

2895-88-U The Coalition of Laid-off Workers, Ontario, Canada. Hereinafter known as the C.L.W., Complainant v. The National Automobile, Aerospace and Agricultural Implement Workers Union of Canada. Hereinafter known as the C.A.W., Locals 439 and 458 of the C.A.W., Respondents v. Varsity Corporation, Intervener

Duty of Fair Representation - Natural Justice - Practice and Procedure - Settlement - Unfair Labour Practice - Complainants alleging union breached fair representation duty by agreeing to settlement of employer's severance pay obligations - Approximately three years passing between signing of settlement and filing of complaint - Board reluctant to allow litigation of complaints after such extreme delay, especially where matter complained of involves a settlement which has been executed and honoured, and when the effect of remedial relief sought is to nullify or rewrite the settlement - Complaint dismissed

BEFORE: Robert Herman, Vice-Chair, and Board Members R. W. Pirrie and D. A. Patterson.

APPEARANCES: Karl Ellison and David Jack for the applicant; Len Maclean, Jack Tubman, Mike Merone and Dan Webster Jr. for the respondent; C. G. Riggs and E. D. Ludlow for the intervener.

DECISION OF THE BOARD; October 5, 1990

1. The named complainant, the Coalition of Laid-off Workers ("the C.L.W."), is an organization that was formed to represent approximately 125 former employees of Massey-Ferguson who were terminated or permanently laid off when several plants were closed by that company. The intervener, Varsity Corporation, was, prior to June, 1986, Massey-Ferguson Limited. At the time the plants were closed, the U.A.W. was the employees' bargaining agent. The respondent C.A.W. is the successor to the U.A.W.

2. In a prior decision, dated February 28, 1990, the Board confirmed and expanded upon several rulings made orally at the hearing held on January 30, 1990. The Board dismissed the complaint insofar as it sought to rely upon the provisions of section 50 and 52(5) of the *Labour Relations Act*. The Board ruled that the complaint under section 68 would proceed. It ruled that the proper complainants are the individual complainants represented by the nominally named complainant, the C.L.W. The Board also directed, confirming the decision it had made at the hearing on January 30th, that further particulars be provided by the complainants. The decision of February 28, 1990 set out in detail the requirement with respect to the filing of further particulars, and the consequences of failure to do so.

3. In a subsequent decision, dated March 28, 1990, the Board granted the request of the complainants that the deadline for the filing of further particulars be extended.

4. The complainants then asked for a further extension. In a decision dated April 18, 1990, the Board declined to further extend that deadline. The Board also declined to issue 115 Summons to Witnesses which Mr. Ellison, the President of the C.L.W. and the representative of the complainants, had requested so that he could have each complainant provide the particulars through testifying. The particulars were not filed by the required deadline. In a decision dated June 1, 1990, the Board confirmed its prior decisions that materials filed beyond the deadline would not be considered and that the case would proceed solely on the basis of the particulars already filed.

5. The hearing resumed on August 14, 1990. In correspondence since the last hearing day Mr. Ellison wrote that the C.L.W. no longer represented certain complainants. At the hearing, none of the following complainants were present and Mr. Ellison advised the Board that they were no longer represented by the C.L.W. (or Mr. Ellison):

Victor Antonio
Roland Brito
Rene Dellosa
Berris Dunkley
Dave Farrington
Lutchmi Gajadhar
James Graham
Nikola Kralj
Lloyd Lasley
Mohesh Patel
Winston Mills
Jack Mitchell
Ray Porter
Henry Poirier
Teddy Radhay
Batic Radomir
Lurio Senador
Pedro Silot
Ram Singh
George Stayman
Wayne Tyler
George Williams

6. There was no indication that any of these individuals wished to continue with their complaint. They were no longer represented by the C.L.W., they did not appear at the hearing although duly notified, and they had not contacted the Board to indicate they wished to continue with their complaints. Accordingly, the Board dismissed the complaint with respect to the above-named complainants. The remaining complainants are those listed in Appendix "A" to this decision.

7. Mr. Ellison then asked that the Board disqualify itself, on the grounds of bias. He filed lengthy written material in support of this motion, which he read verbatim to the Board as his submissions. At the conclusion of his submissions, and after a short recess, the Board ruled it would not disqualify itself. Having read Mr. Ellison's material and considered his submissions, in the Board's view there was nothing in either the materials or the submissions which would lead the Board to disqualify itself. There was no impropriety committed by the Board in its conduct of the hearing or in reaching its earlier decision, nor any reasonable apprehension of bias which would lead the Board to disqualify itself. Accordingly, the Board ruled that the hearing would proceed.

8. The respondent CAW submitted that this section 68 complaint should be dismissed, on the ground that there was no *prima facie* case or, in the alternative, that there was such extreme delay in filing the instant complaint that the Board ought to exercise its discretion under section 89 of the Act and dismiss the proceeding. The parties agreed that the particulars filed by Mr. Ellison could be accepted as the facts for the purposes of considering both objections, and the Board accordingly did so. The Board also had before it numerous exhibits. Some of these were filed on

agreement of the parties. Others were offered by Mr. Ellison and, over the other parties' objections, accepted by the Board.

9. Of the numerous materials, we set out some of the important ones. In the complaint form filed with the Board on February 22, 1989, (Form 58), the complainants state that:

4. ...

On or about MARCH 04, 1986 the grievor(s) was (were) dealt with by Mr. Basil Har-grove Assistant to the Director of the C.A.W. Canada of the respondent contrary to the provisions of section(s) Sec. 50, Sec. 52 s.s. 5 & Sec. 68 of the *Labour Relations Act* in that he did on his own behalf or on behalf of the respondent: (A) Accepted a monetary settlement on the behalf of the General Membership of Loc. 439, C.A.W., with prior knowledge that, it was a sub standard offer as compared to the provisions of the Collective Agreement existing between the company and the union. (B) Revised the Collective Agreement that existed between the company and the union without the consent or approval of the General Membership of Loc. 439 C.A.W. (C) Accepted a monetary settlement on the behalf of the General Membership of Loc. 439 C.A.W., knowing full well that it discriminated against the General Membership of Loc. 439 C.A.W., insofar as, the acceptance of the settlement did in fact, violate the Rights of the General Membership of Loc. 439 C.A.W., from seeking further redress from the company as set out in the Employment Standards Act, R.S.O. 1980, chapter 137 & Regulation 286, R.R.O. 1980, regarding the provisions pertaining to Termination and Severance payments.

5. The following steps have been taken on behalf of the grievor(s) for the adjustment of the matters giving rise to the complaint (if none has been taken state the reason why): No steps have been taken. The President of the C.L.W. by form of a letter dated, March 23, 1983, requested to meet with the Executive Board of Loc. 439 C.A.W. The request was denied. Further, the President of the C.L.W. by form of a letter dated, April 19, 1983, asked the same Executive Board for a meeting. There was no reply from Loc. 439. Again the Special Advisor from the C.L.W. by form of a letter dated, April 17, 1985, requested to meet with the Executive Board of Loc. 439 C.A.W. It was again denied.

6. The person, trade union, council of trade unions or employers' organization set out above in paragraph 3(a) is affected by the complaint for the following reason(s): Massey-Ferguson Ltd. failed to comply with, as well, the C.A.W. Local & National Officer did not protect our Rights under the Employment Standards Act, R.S.O. 1980, chapter 137, Sec. 40, s.s.1, par(A),(B),(C) & (D). Also Sec. 40, s.s.2. Also Sec. 40, s.s.7, par (A), (B) & (C). Also Sec. 40a, s.s.2, par(E), (F) & (G). Further under Regulation 286, Sec. 4, par (A), (B) & (C). Also any other applicable sections of the Employment Standards Act and or any parts of Regulation 286.

7. Other relevant statements: On the day of February 19, 1987, a decision was issued by a Referee appointed by the Ontario Labour Relations Board, regarding the Claims of Five individuals pertaining to the same Claims listed here by the Grievor and from the same Local Union, National Union and Company as the Grievor. The Award issued to the Five individuals far exceeded those people that received amounts in accordance with the Memorandum of Agreement, dated March 04, 1986. The Respondents were very much aware of the existence of the Five Claimants and were also invited to participate with the Five Claimants. The National & Local union by form of a letter refused the offer. Whereby, they were willing to knowingly settle for much less than the Ontario Labour Laws provided. Copies of the Memorandum of Agreement and the Memorandum of Settlement are presently on file with the Ontario Labour Relations Board.

10. In a letter dated August 5, 1989, Mr. Ellison wrote to counsel for the respondents setting out further particulars, as follows:

• • •

In regards to the complaints filed by the C.L.W. on Form 58 and in particular Section 50 of the Ontario Labour Relations Act. The C.L.W. alleges that, the Officers of the Master Bargaining Unit of Loc. 439 C.A.W. and the assigned Officers of the National C.A.W. that participated in negotiations with the company of Massey-Ferguson Ind. Ltd., Toronto, involving the matters of Termination and or Severance Pays for the Employees, did so, without proper or legal authority from the Employees. Further, said Officers accepted a settlement which in fact prohibited further actions being taken against the Company by the Employees.

Furthermore, in accepting the said agreement, known now as the "Memorandum of Agreement", 1986, the C.A.W. Local and National level Reps did not work in compliance with the existing "Separation Agreement" which is listed in the Local Union Benefit Agreement. Nor was the 2.9. million dollars calculated in accordance with the minimum standards of the provisions that govern Termination and or Severance Pays under the Ontario Employment Standards Act and also Regulation 286.

Therefore, those responsible for the acceptance of the "Memorandum of Agreement" 1986, are, in our eyes, guilty of changing an existing Collective Agreement without the consent of the General Membership of Local 439 C.A.W.

Since you are a Lawyer, you must realize by now, that, unless otherwise stated, Two parties of an Agreement, can not change an Agreement in part or whole, unless all parties to that said agreement authorize such changes. We, the C.L.W. allege that, the General Membership of Local 439 C.A.W. did not provide such authorization or consent, either written or verbal to those responsible for the signed negotiated settlement now known as the "Memorandum of Agreement".

Section 50 of the Ontario Labour Relations Act clearly states and I quote, "a Collective Agreement is, subject to and for the purpose of this Act, binding upon the Employer and upon the Trade Union" etc. etc. Of course the essential word is BINDING.

Therefore, on Form 58 as filed by the C.L.W., the C.L.W. applies that Section 50 of the Ontario Labour Relations Act was in fact, violated by the team of Officers from the Local and the National levels of the C.A.W. that did in fact participate in the negotiations that resulted in the birth of the "Memorandum of Agreement", 1986. The C.L.W. nor its' Officers are required to furnish said Council for the Respondent Union as to specific Names, Dates or Places and Times in reference to the Officers referred to in the previous paragraphs of this letter.

However, the C.L.W. is prepared to introduce Physical and Verbal Evidence to support their claims, but, only when we meet before the Ontario Labour Relations Board for our Hearing.

Part Two of our Complaint under Section 89 of the Ontario Labour Relations Act deals directly with Section 52, Sub Section 5 of the Ontario Labour Relations Act. Insofar as the C.L.W. alleges that the Officers of Local 439 C.A.W. and in particular certain C.A.W. National level Officers advised any and all of the General Membership of Local 439 C.A.W. that, the negotiation taking place at the time, dealt solely with the argument of "Improper Layoffs". Not on the matters of Termination and or Severance Payments. Furthermore, any signed authorization forms from the Local Union provided, did not set out in detail or otherwise what, in fact, the General Member was signing authorization to be represented for by the Local Union against the Company.

You and I both realize that, "improper layoffs" are a matter for arbitration when, there exists a Collective Agreement which, includes provisions of that nature. Then and only then it becomes a matter for arbitration when in fact, the grievance procedure has been exhausted. That is, provided the Collective Agreement outlines a grievance procedure. Those actions do not require the consent or authority of the General Membership. They are, in fact, matters that, begin at the third step of a Grievance Procedure due to the fact that they are matters that deal in the areas of Policy grievances.

In any event, they do not apply to our current complaints against the Respondent Union.

Again we, the C.L.W. will provide Physical and Verbal evidence at the hearing to support our claim that, the Respondent Union violated Section 52, Sub Section 5 of the Ontario Labour Relations Act.

Part Three of our complaint as listed on Form 58, under Section 89 of the Ontario Labour Relations Act, deals directly with Section 68 of the Act.

The C.L.W. alleges that, representatives of the Respondent Union at the National and Local levels did not have the authorization or consent of the General Membership to represent them on matters such as Severance and or Termination payments. Furthermore, the Respondent Union deliberately mislead and misinformed each member that did sign any authorization forms provided by the Respondent Union Reps. With our evidence to be introduced at the Hearing, we intend to prove specifically how, when and where the Respondent Union acted on our behalf in Bad faith by deliberately misleading its' Membership.

Furthermore, the Respondent Union accepted a settlement on the behalf of its' Membership which Prohibited any of its Membership from taking further actions against the Company in regards to any of the areas covered by the settlement. Whereby, the acceptance of the settlement actually and in full, Discriminated against any and all Members from exercising their Rights to proceed any further against the company of Massey-Ferguson Ind. Ltd., Toronto, on any matters pertaining to Severance and or Termination payments.

With regards to the question of the Respondent Union allegedly acting in an Arbitrary manner. The C.L.W. alleges that, the Respondent Union did not provide us with options to proceed as outlined in the Employment Standards Act. In particular, any and all provisions which govern the areas of Severance and or Termination Pay. Including Regulation 286. But, in fact, even though the Respondent Union Reps. had prior knowledge of the Employment Standards Act and Regulation 286, they proceeded to negotiate and to accept a Sub Standard settlement which was in fact, well below the minimum standards of the Employment standards Act and Regulation 286.

My own personal evidence will provide without any doubt, that, the Respondent Union was in access and possession of the Employment Standards Act, Regulation 286 and the Ontario Labour Relations Act. Further that, the Respondent Union did, in fact, have prior knowledge of the provisions of said Acts and Regulations, but, made no attempt to apply any or part or all of the Sections and Articles pertaining to the issues at hand.

However, the Respondent Union elected to proceed on their terms and conditional provisions. Regardless of their knowledge of greater monetary provisions as outlined in the Employment Standards Act and Regulation 286.

In short, the Respondent Union Reps. deliberately did not do their best to represent their Members on these matters. They did what they wanted to do without due concern for the Rights of the many people that Trusted them to give them proper representation.

...

11. The Board also had before it a copy of the settlement between five former employees of Massey-Ferguson (including the complainants Ellison and Hinds) with respect to their termination pay and other amounts pursuant to the *Employment Standards Act* (Exhibit 2), and the decision of the Referee appointed under the *Employment Standards Act*, in which the Referee approved the settlement (Exhibit 3). The decision of the Referee explains some of the background of the instant proceeding. It reads, in part, as follows:

DECISION

....

The employees of the Respondent in both Toronto and Brantford were, at all material times,

represented for collective bargaining purposes by locals of the United Automobile, Aerospace and Agricultural Implement Workers of America (the U.A.W.) which has since become the Canadian Auto Workers. It is common ground that the U.A.W. obtained the written authorization of employees in respect of the right to negotiate on their behalf with the Respondent, in conjunction with officials of the Employment Standards Branch of the Ministry of Labour, respecting their claims to termination pay and severance pay under the **Employment Standards Act** arising out of the whole or partial discontinuance of operations at the Respondent's plants in Toronto and Brantford.

On March 4, 1986, the Respondent and the U.A.W. executed a memorandum of agreement in full settlement of the claims of all employees on whose behalf the Union was authorized to negotiate a settlement. I am satisfied that the compromise so reached is permissible under the Act and is indeed contemplated by the terms of section 47(1)(b) of the Act which provides:

47.(1) Where an employment standards officer finds that an employee is entitled to any wages from an employer, he may,

• • •

(b) receive from the employer on behalf of the employee any wages to be paid to the employee as the result of a compromise or settlement;

• • •

The evidence and representations before the referee establish that the rights under the Act of all employees save the five remaining claimants in this reference are finally determined and settled for all purposes by the terms of the memorandum of settlement of March 6, 1986 concluded between the Union and the Respondent. As the U.A.W. proceeded to negotiate with the authorization and knowledge of the employees concerned, I find and determine that the rights of any employee who did not revoke his or her express or implied authorization to the Union by filing a separate claim under the **Employment Standards Act** on his or her own behalf prior to the date of the settlement are settled and determined for all purposes of the Act. The right of those employees is to share in the proceeds of the settlement, as concluded and implemented by their Union in accordance with the terms of the memorandum of agreement.

Only five claims remain outstanding. I am satisfied that each of the five claimants remaining in this reference either refused to authorize the U.A.W. to represent them in respect of their rights under the **Employment Standards Act** or, if they initially signed an authorization form, clearly and unequivocally revoked it by subsequently filing a separate individual claim with the Employment Standards Branch under the Act prior to March 6, 1986, the date of the memorandum of agreement between the Union and the Respondent. These are, in other words, the only outstanding claims in respect of which the Respondent or its successor, the Massey Combines Corporation, may be liable under the Act.

During the course of the hearing, and after a substantial amount of evidence had been adduced, the Respondent, through its successor the Massey Combines Corporation and the Claimants reached terms of settlement which were incorporated in a memorandum of agreement dated January 20, 1987. The agreement reached is expressly described as being without prejudice to the parties' positions. The memorandum provides for its ratification by the Respondent which I am now advised by counsel was done on February 4, 1987. A copy of the memorandum, now signed by both parties has been filed with the referee.

In accordance with the agreement of the parties, therefore, and being duly notified of their consent to this Decision I hereby order that the Respondent pay to the respective claimants within 30 days of the date of this Decision, the following amounts, subject to appropriate deductions for Unemployment Insurance and income tax purposes:

D. Aitchison	\$7,537.44
W. Archer	\$5,246.40
K. Ellison	\$6,403.20
R. Hinds	\$4,655.04
W. Lucente	\$9,468.80

Dated at Toronto this 19th day of February, 1987.

12. Attached to the decision of the Referee is a copy of the Memorandum of Agreement, dated March 4, 1986, between the intervener and the respondent, in which those parties settled the termination and severance pay claims with respect to the former employees who had authorized the union to represent them in this matter. This settlement apparently covered all of the complainants, except for Hinds and Ellison, who were covered by the settlement set out immediately above. This Memorandum of Agreement reads as follows:

MEMORANDUM OF AGREEMENT

The Union has initiated an action pursuant to the Employment Standards Act on behalf of certain employees who were terminated or laid off in the Massey-Ferguson operations since 1981.

The Union, on behalf of all present and former employees in the Bargaining Unit who authorized the Union to represent them in this action, releases the Company with respect to all claims involving layoffs or terminations from January, 1981, to date. While the parties recognize former or present employees who have not authorized the Union to represent them may have a claim and if so, they intend this agreement to embody those individuals and will invite and encourage them to participate in this settlement. Such individuals can do so by demonstrating a claim and authorizing the Union to represent them and releasing the Company from further liability.

While in no way admitting liability, the Company shall accrue based on future operations at the rate of \$100,000 per month starting February 1, 1986, to provide monies available to the eligible individuals in settlement of the claims heretofore mentioned. The total amount of the settlement shall be \$2.9 million. In order to facilitate access to the monies, the Company agrees to advance the following sums on the dates specified:

April 1, 1986	-	\$900,000.00
February 1, 1987	-	\$1 million
February 1, 1988	-	\$1 million

The 1986 and 1987 advances may be combined by agreement whereby the 1986 advance is sufficiently delayed to warrant the moving up of the 1987 advance (i.e. rather than \$900,000.00 on April 1, 1986 and \$1 million on February 1, 1987 it would be \$1.9 million on December 1, 1986).

Disbursement of the monies shall be as negotiated by the parties in contemplation of the intent of this memorandum, and governed by the validity of the claims.

The Union further agrees that neither it nor any of its officers or representatives shall support any group or individual action or claim rising out of any termination or layoff as contemplated in the terms of this Memorandum of Agreement.

The parties agree to inform the Employment Standards Branch of the Ministry of Labour of Ontario of this settlement through their respective attorneys who will move that the hearings scheduled on the matter be cancelled and the claims considered closed.

The Company and the Union agree that any dispute between the parties concerning the interpretation, application or alleged breach of this Memorandum of Agreement, including failure by the parties to negotiate the disposition of the monies as described above, may be referred by either party without reference to the grievance procedure of the collective agreement immediately to a single arbitrator appointed under the Labour Relations Act.

13. Other exhibits included various pieces of correspondence filed by Mr. Ellison. In a letter dated March 23, 1983 (Exhibit 6), from Mr. Ellison to John Duff, President of Local 439 at the time, Mr. Ellison writes, in part, as follows:

As an organized group of laid-off workers and in fact, many of us are no longer, members-in-good-standing with Local 439's membership, we realize that you have no legal or constitutional obligations to meet with us. But, most of our members are of the opinion that you will meet with us. They feel this way because simply, they feel that you must be just as concerned as we are about the present situation at Massey-Ferguson, Toronto plants.

... We are looking forward to a meeting with you ...

14. And in the letter dated May 14, 1985 from John Duff to Tom Vardy (the Special Advisor to the C.L.W.) Mr. Duff wrote, in part, as follows:

In response to your letter dated April 17, 1985 I wish to advise you that the matter of Termination Pay for laid off employees of the Massey Ferguson Corporation and members of Locals 439 and 458 UAW is in the hands of the attorneys at law for our union in Canada and their intention is to prosecute this matter to a successful conclusion on behalf of all the members who have signed the authorization requesting us to act for them.

15. In a letter dated July 10, 1985, from Basil Hargrove, the Administrative Assistant to the U.A.W. Director for Canada to Mr. T. Vardy (Exhibit 12), Mr. Hargrove wrote, in part, as follows:

As I am sure you are aware, under the Employment Standards Act of the province of Ontario, individual workers must make a claim for severance or termination pay themselves. Their bargaining agent or anyone else can only represent them if they are authorized in writing to do so.

16. We turn first to whether the complaint ought to be dismissed as disclosing no *prima facie* case. We must assess whether the complainants have set out sufficient facts such that there is an arguable case to be heard. This assessment must be made in context. The complaint (and subsequent correspondence) was deficient in particulars. Rather than dismissing the complaint, the Board provided an opportunity to the complainants to set out the relevant material facts, and it directed that further particulars be provided. We do not propose to recite the text of our earlier decisions on this point, but we did consider the legal requirement for particulars, and that fairness demanded they be provided (see in this regard, the prior decision of February 28, 1990). The Board indicated that failure to provide the particulars would result in the complaint proceeding solely on the basis of the particulars already filed and that the complainants would not be able to lead evidence of any material fact or matter which had not been so particularized. It also indicated that failure to file the particulars might lead to dismissal of the complaint without inquiring into the merits. No further particulars were properly filed. Since the parties have agreed that the facts can be taken as found in the materials that were properly before us, for purposes of the two preliminary objections, the Board in effect has before it all the evidence in the proceeding.

17. There is no doubt that the complainants have alleged certain matters which, if proven, might arguably constitute breaches of section 68 of the Act. For example, when the complainants allege that the respondent union "deliberately mislead [sic] and misinformed each member that did sign any authorization forms provided by the respondent union reps" (see paragraph 9, *supra*) they make an allegation which might arguably constitute a breach of section 68, provided material facts in support of that allegation were proven. What material facts have been alleged we accept as true. But there are not sufficient material facts to support this allegation. The complainants were directed to indicate, for example, the names of any individuals who are alleged to have made misrepresentations, the statements that were made, and the circumstances under which they were

made. They failed to file those particulars. What we are left with is a mere assertion that the complainants were misled or misinformed. These are not material facts on which we can conclude that an arguable breach of section 68 has been pleaded. And insofar as Mr. Ellison and Mr. Hinds are concerned, since they negotiated their own settlements, there are not even assertions of how the union might not have represented them fairly.

18. Other assertions by the complainants might also constitute breaches if there were sufficient material facts to support them. But it does not appear that any of those allegations would arguably constitute breaches of section 68 on the facts as pleaded. To take another example, in numerous places the complainants assert that the C.A.W. did not obtain the proper authorizations from employees to negotiate on their behalf. But the complainants do not identify a single person for whom the CAW is alleged to have negotiated without proper authorization. Nor have they indicated any other material fact about the individual former employee, such as whether s/he accepted any settlement monies that the CAW obtained. The only facts we have relevant to the claim of misrepresentation contradict the allegation of misrepresentation. The documents filed by Mr. Ellison are inconsistent with the complainants' assertion that they did not understand that they were authorizing the CAW to negotiate termination and severance pay on their behalf. In correspondence between officers of the CAW and members of the C.L.W. (the complainants), the CAW advised the C.L.W. that the CAW would negotiate the termination and severance pay if specifically authorized by an employee to do so. The C.L.W. was therefore accurately advised of the nature of the authorizations employees could sign.

19. There is one submission we would specifically address. Mr. Ellison argued that there was a *prima facie* case because the Board Officer, who had met with the parties in an effort to settle the matter, must have already determined that a *prima facie* case existed, since the matter was subsequently scheduled for hearing. With respect, Mr. Ellison has misunderstood the role of a Board Officer in Board proceedings such as the instant complaint. The Officer's role is to assist the parties, to try to narrow the issues in dispute through discussion and mediation, and to attempt to settle the matter. An Officer is not authorized to, nor does s/he, rule upon whether a *prima facie* case exists, or whether the Board should exercise its discretion to allow a full hearing on the merits. That is a matter for the Board to determine.

20. The Board should only dismiss a complaint at this preliminary stage where there is no reasonable likelihood that a complaint can succeed on the facts as alleged. For example, in *J. Paiva Foods Ltd.*, [1985] OLRB Rep. May 690, the Board wrote:

The Board's discretion to dismiss a complaint on the grounds that it does not disclose a *prima facie* case should only be exercised in the clearest of cases, that is, when the Board is satisfied that there is no reasonable likelihood that a violation of the Act can be established on the facts as alleged. This approach has been set out in the *International Association of Bridge, Structural and Ornamental Ironworkers*, [1982] OLRB Rep. Feb. 233 at page 234:

Although counsel for the respondents contended that the Board has a duty to dismiss a complaint which does not make out a *prima facie* case, section 71(1) clearly provides the Board with a discretion. In some circumstances it is eminently appropriate for the Board to exercise its discretion under that provision to dismiss a complaint where it is apparent that no useful purpose would be served in listing the complaint for hearing since the facts as alleged could not support an argument that a violation of the Act had occurred (see, for example, *Heist Industrial Services*, 63 CLLC 16,263; *Patternmakers Association of Hamilton and Vicinity*, [1970] OLRB Rep. Sept. 688; *Ernest D'Andrea*, [1075] OLRB Rep. Aug. 646; *Local 1285 United Automobile Aerospace & Agricultural Workers Union of America*, [1975] OLRB Rep. Apr. 387; *Masonry Contractors' Association (Toronto-Incorporated)* [1970] OLRB Rep. Dec. 1124; and *Woodall Construction Company Limited*, [1979] OLRB Rep. June 597).

See also *Caravelle Foods*, [1983] OLRB Rep. June 875 at page 881 where the Board stated:

The words 'prima facie' in section 71 are meant to allow the dismissal of a case without a hearing where the allegations are insufficient to render *reasonable or arguable a conclusion that the Act has been breached*.

See also *Shaw v. McLeod*, (1982), 35 O.R. (2d) 641. And see *Elizabeth Balanyk*, [1987] OLRB Rep. Sept. 1121.

21. Given the bald assertions in the materials, but the lack of material facts essential to support them, we are satisfied that there is no reasonable likelihood that the complainants can establish a breach of section 68 by the respondent union. Accordingly, the complaint is dismissed on this basis.

22. We also dismiss the complaint on the grounds of delay. In the decision of February 28, 1990, we wrote as follows:

24. We note that the respondents have indicated they will argue that the Board ought to decline to inquire into this matter on the grounds of delay; that is, the events alleged to have breached section 68 occurred so long before the instant complaint was filed, the complaint ought to be dismissed without deciding whether section 68 was breached. The particulars therefore should also set out the material facts upon which the complainants intend to rely with respect to what occurred between the events said to have breached the Act (which appear to have occurred before or leading up to March, 1986) and the date that the complaint was filed, February 22, 1989.

23. The facts particularly relevant to the delay issue are fairly straightforward. When Massey-Ferguson closed down several plants, a great number of employees were permanently laid off. These closures occurred, as the decision of the Referee discloses, between July 1981 and June, 1985. The Reference to the Referee, dealing with the rights of the employees under the *Employment Standards Act*, was made in June, 1985. On March 4, 1986, a settlement was reached between the CAW and the employer on behalf of all those employees whom the CAW was authorized to represent with respect to claims for termination and severance pay. The rights of those employees (which includes all of the complainants in this proceeding save for Mr. Ellison and Mr. Hinds) were finally determined by that settlement. In January, 1987, a Memorandum of Settlement was reached between five employees for whom the CAW had not been authorized to negotiate, including the two remaining complainants in this proceeding, Mr. Ellison and Mr. Hinds. It was ratified on February 4, 1987. A decision (dated February 19, 1987) of the Referee appointed pursuant to the *Employment Standards Act* endorsed both those settlements. Nothing further occurred until the instant complaint was filed on February 22, 1989. No explanation has been provided for any part of this lengthy delay. (As noted, no further particulars were filed.) The complainants (save Mr. Ellison and Mr. Hinds) are seeking to set aside their settlement and be awarded what they assert are the proper amounts of termination and severance pay under the provisions of the *Employment Standards Act*.

24. The Board's consideration of delay in the exercise of its discretion has been commented upon in a number of decisions. In *The Corporation of City of Mississauga* [1982] OLRB Rep. Mar. 420 the Board wrote as follows:

20. It is by now almost a truism that time is of the essence in labour relation matters. It is universally recognized that the speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour-management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once crystallized, could exist indefinitely in a state of suspended animation and be revived to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it -

including the employees - are entitled to expect that claims which are not asserted within a reasonable time, or involve matters which have, to all outward appearances, been satisfactorily settled, will not reemerge later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for the filing of grievances (as the union and the employer in this case have done) and arbitrators to construct a principle analogous to the doctrine of latches to prevent prosecution of untimely claims. (See *Re. C.G.E.* 3 L.A.C. 980 (*Laskin*); and *Re Oil Chemical and Atomic Workers, Local 9-672 and Dow Chemical of Canada Limited* [1966] 18 L.A.C. 51 (*Arthurs*)).

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay - holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship - quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience takes some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

25.

And in *Sheller-Globe of Canada, Ltd.* [1982] OLRB Rep. Jan. 113:

13. A delay of the present magnitude carries with it an element of prejudice which is undeniable. Memories fade, and a party's ability to present a defence will deteriorate for that reason alone. This is particularly true when a party is not on notice that an action against it, requiring the litigation of certain events, remains pending. Here the respondent was justifiably under the impression that the grievance route, or any further demands against the union, had been abandoned in favour of other actions against the company. The lingering discussions which the complainant's husband had with Mr. Pattison and the stewards were clearly of an amicable nature; they provided no indication that action would subsequently be directed against the trade union itself, so that notes or other forms of evidence could be more actively maintained. The defence of the employer is *not* the defence of the trade union in these proceedings. The Board would be concerned not with the matter of cause for discharge, but rather the steps which the respondent's officials went through in concluding in their own minds that no grounds for a grievance existed. That defence would turn upon the recollections and credibility of the respondent's own officials. It might be noted parenthetically that the Labour Board, in administering the *Labour Relations Act*, is primarily concerned with the ongoing labour relations of a workplace, and such workplaces do not remain static over time. The Board as a result has always been conscious of the need for expedition in its practices and procedures. The delay in the present case raises concerns over an appropriate remedy, if the Board *were* to permit this complaint to now proceed, which are not fully answered by the complainant's concession as to damages. In circumstances such as the present, the onus shifts to a complainant to satisfy the Board that there are compelling labour relations reasons to cause the Board to exercise its discretion and entertain the complaint under section 89.

14. The Board in *CCH Canadian Limited*, [1977] OLRB Rep. June 351, stated:

3. The Board as a general rule will not refuse to entertain a complaint under section 79 only because of a delay in lodging the complaint. Where unreasonable delay has occurred, the Board in most cases will simply take this factor into account in assessing any compensation which might be awarded. In the instant case, however, we are of the view that because of the extreme delay in the filing of the complaint and, in the circumstance the lack of any mitigating factors which might justify or excuse such a delay, the Board should exercise its discretion under section 79 of the Act and refrain from inquiring into the complaint.

In a similar vein, see *Concrete Construction Supplies*, [1979] OLRB Rep. Aug. 739. In *Irving Posluns Sportswear*, [1979] OLRB Rep. Oct. 986, the Board found an almost three-year delay in filing a section 68 application with respect to the non-payment of certain monies to be "extreme", and refused to entertain that portion of the complaint.

15. In the present case, the delay has indeed been "extreme", and the factors put forward by the complainant are insufficient to deliver her from the consequences of that delay. Certainly the Board has no quarrel with the notion of an aggrieved individual investigating other avenues of redress prior to launching a section 68 application with the Board. But a point is reached, after a reasonable period of time, when the individual must decide whether it is going to go against the trade union or not, and if so, then overt steps must be taken in that direction. The individual cannot rely indefinitely on the efforts being taken on his or her behalf in other directions, and then come back against the trade union when those efforts prove fruitless. The important point to note here is that the other forms of action being pursued by the complainant were directed solely against the employer. Not a word was said to the trade union during that period to indicate that its conduct was being viewed as unlawful, or that its own position might still be placed in jeopardy. The complainant will not now be permitted, at this late date, to use section 68 against the trade union as a last resort to reach the employer.

(upheld on judicial review, at 42 O.R. (2d) 73)

26. All the complainants but Hinds and Ellison were covered by the settlement reached on March 4, 1986. That settlement finally determined and settled their rights under the *Employment Standards Act*. These complainants now seek to set aside that settlement and they ask that the Board award them the amounts of termination and severance pay they claim they would have received had the respondent union properly represented them. These complainants were not the only former employees who were covered by that settlement. The rights of many others were also finally determined by the settlement, and benefits were paid out and received under the settlement terms. Approximately three years have passed between the signing of the settlement and the filing of this complaint. The Board is generally reluctant to allow litigation of alleged unfair labour practices long after the events complained of have arisen. The Board is even more reluctant to permit such litigation when the matter complained of involves a settlement which has been executed and honoured and when the remedial relief sought is to nullify or rewrite the settlement. It would be extremely prejudicial and unfair to the union and the company, the parties to the settlement of March 4, 1986, to now adjudicate the question of whether the respondent union breached section 68 in its representation of the complainants with respect to that settlement. It would also be extremely prejudicial to the many former employees who benefited from that settlement who are not seeking to set it aside. It was incumbent upon the complainants, if they wished to complain about the conduct of the union in this respect, to move expeditiously to do so. As noted in paragraph 23, no explanation has been provided for the delay. Given the delay of three years and the prejudice it would cause to now proceed, we exercise our discretion under section 89 of the Act and we decline to inquire further into this complaint. The complaint is accordingly also dismissed on this ground, with respect to all the complainants save for Mr. Ellison and Mr. Hinds.

27. Mr. Ellison and Mr. Hinds were not part of the settlement entered into March 4, 1986,

as they had not authorized the CAW to negotiate on their behalf. They, along with three others, negotiated their own settlement of their rights under the *Employment Standards Act*. That settlement was signed on January 20, 1987, and was endorsed by the Referee on February 19, 1987. There is no explanation as to why they delayed approximately two years between the time that they reached a settlement and the time they filed the instant complaint. The comments expressed above about delay and prejudice apply to these circumstances as well. Where the conduct complained of concerns activity leading to a settlement, which has been executed and honoured, and by which the complainants and others have benefited, a delay of two years before a complaint is filed is too long. Accordingly, the complaints of Mr. Ellison and Mr. Hinds are also dismissed on the grounds of delay.

[Appendix "A" List of complainants omitted - Editor]

2865-89-G The Ontario Allied Construction Trades Council, Applicant v. The Electrical Power Systems Construction Association, Respondent

Construction Industry - Construction Industry Grievance - Employee assigned to light work in pallet yard as part of rehabilitation program following injury - Employee alleging layoff contrary to collective agreement - Employer arguing pallet yard work not covered by collective agreement - Pallet yard employees paid same wages as construction workers covered by agreement - Union dues deducted - Health and welfare and pension remittances made - Employer attempting to observe union jurisdiction claims in pallet yard - Employee covered by agreement - Employee laid off contrary to agreement

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *D. A. MacDonald* and *P. V. Grasso*.

APPEARANCES: *John Moszynski* for the applicant; *John Saunders* for the respondent.

DECISION OF THE BOARD; October 16, 1990

1. This grievance has been filed pursuant to section 124 of the *Labour Relations Act*. The grievor, Mr. Richards, alleges his lay-off violated the terms of the collective agreement between the Electrical Power Systems Construction Association ("EPSCA") and the Ontario Allied Construction Trades Council ("Council") under which he was covered. The respondent employer Ontario Hydro (which is bound to that collective agreement) asserts that this Board does not have "jurisdiction" to adjudicate upon this grievance because Mr. Richards was not covered by that collective agreement.

2. Before turning to the events which precipitated this grievance, and the evidence and the representations of the parties, we note that Ontario Hydro ("Hydro") has not in defence of this grievance raised any issue other than the applicability of the collective agreement to the grievor. The *only* issue before us is whether the grievor is covered by the agreement. Ontario Hydro conceded that if the collective agreement applied, Mr. Richards was laid off in violation of that collective agreement.

3. We note also that the issue before us is more appropriately characterized as an issue of

“arbitrability” rather than “jurisdiction”. Pursuant to section 124, we have the jurisdiction to hear grievances arising out of a collective agreement between a construction industry trade union and a construction industry employer as defined in section 117 of the *Labour Relations Act* (see *Babcock and Wilcox Canada Ltd.*, [1988] OLRB Rep. Dec. 1198). Here, Hydro concedes that it is bound to the collective agreement, but argues that it is not bound to apply the collective agreement to work which it asserts is not covered by the collective agreement. The question therefore is not whether we have jurisdiction to hear the grievance, but whether the subject matter or merits of the grievance is arbitrable. Sections 124(1) and 124(3) provide the Board with jurisdiction to determine that matter.

The Facts

4. Having heard and assessed the evidence of all of the witnesses we find the following facts to be relevant.

5. Mr. Richards commenced work with Hydro at the Darlington Nuclear Power Generating Station Project (“Darlington”). Mr. Richards is a member of the Labourers International Union of North America (“Labourers”) and came to work at Hydro through the union hiring hall. There is no dispute that the Labourers are bound to the collective agreement between EPSCA and the Council (“the agreement”). On April 9, 1986, Mr. Richards suffered an industrial accident. He was off work and received Workers Compensation until March 15, 1987 at which time he returned to work at Darlington for Hydro as a night dispatcher. This job he considered to be a “light duty” job. There is no dispute that while employed in this capacity Mr. Richards was covered by the agreement and all the terms and conditions of that agreement were applied to him. It is also not disputed that the work of night dispatcher is Labourer’s work covered by the Labourers Appendix to the master agreement. Mr. Richards continued in this job for three or four months until June or July of 1987 at which time he suffered a reoccurrence of his injury and went back on Workers Compensation.

6. Mr. Richards next returned to work on July 25, 1988. At that time he commenced work in the “pallet yard”. In September 1988 Mr. Richards reinjured himself. He next returned to work for Hydro at Darlington in the pallet yard on January 3, 1989 and worked there until January 25, 1989. Then he was on Workers Compensation again but returned to work in the pallet yard in August 1989. He continued in the pallet yard until he was laid off by Hydro on November 3, 1989.

7. The crux of the issue before us is whether the work performed by Mr. Richards in the pallet yard is work covered by the agreement. The Council submits it is. Hydro states it is not. It is therefore necessary to set out in some detail the work performed in the pallet yard and how this work fits in with Hydro’s broad program to rehabilitate injured workers.

8. In an effort to provide useful and gainful employment to injured workers and thereby encourage injured workers to return to work, and in an effort to control its own Workers Compensation cost, Hydro has, over the years, established a comprehensive rehabilitation program. Initially, Hydro’s efforts to accommodate an injured workers’ return to the workforce was limited to a “light duty” program. Employees with work restrictions were returned to work as part of a regular construction crew. The employee would perform duties *similar* to other members of the crew but, because of an inability to perform the full range of duties due to his/her restrictions, the employee would generally be assigned to lighter duties performed by that crew. There is no dispute that this work is construction industry work covered by the agreement.

9. This “light duty” program was unable to accommodate all of the injured workers. Hydro soon expanded the rehabilitation program by having injured workers who were subject to

work restrictions perform what it termed as "construction maintenance" on site. Persons with work restrictions were put in a crew that performed such "construction maintenance" work as the repair of door latches on site. This "construction maintenance" work was described as work which was not directly associated with the construction of the generating station, but was support work needed to "maintain" the facilities. In addition, some injured workers were assigned to scaffold inspection. Other injured workers (carpenters by trade) worked in the carpentry shop. Again it is not disputed that all of this work was construction industry work covered by the agreement.

10. As neither the light duty program nor the construction maintenance work program were sufficient to accommodate the return to work of all the injured workers, Hydro added another level to its rehabilitation program namely, the "pallet yard". Hydro maintains that its rehabilitation program is limited to the work at the pallet yard and that this program is separate and distinct from both its light duty and construction maintenance work program. Hydro submits that the work in the pallet yard is not construction industry work and is not covered by the agreement. It asserts that, unlike the light duty or construction maintenance work, the work in the pallet yard does not contribute to the construction project or work for the "bulk power system". Hydro argues that whereas the work performed by employees in the light duty and construction maintenance programs would have been performed in any event, the production of pallets was a "make work" project which would not normally have been performed by the construction trades on site.

11. The Labourers assert that the rehabilitation program is an all encompassing one and includes all three aspects of the program - the pallet yard, the light duty program and the construction maintenance crew. In this regard, counsel of the Labourers points to the evidence that there is an interchange between participants in each of the three levels. In addition, there is a natural progression as employees move from the pallet yard to one of the other levels as they become more fit or able to perform a wider range of duties. Counsel argued that as the rehabilitation program is an all encompassing one, Hydro cannot divide up that work to say that some of it (light duty and construction maintenance) is construction industry work covered by the agreement while another part of the rehabilitation program (the pallet yard) is not.

12. In our view, given the evidence that there is only a minimal or occasional interchange of employees (i.e. employees from the pallet yard *occasionally* work at light duties on site) and because only a few employees have "progressed" from the pallet yard to light duties we find that for purposes of these proceeding Hydro's rehabilitation program is limited to work at the pallet yard. The evidence shows that the grievor, Mr. Richards was, at all relevant times employed only in the pallet yard. He did not progress to either of the other two programs. His work was restricted to the pallet yard and while at the pallet yard he did not at any time do any of the work which Hydro concedes is construction industry work covered by the collective agreement such as the light duty work or the construction maintenance work on site. Accordingly, we propose to determine only whether the work at the pallet yard is work covered by the agreement.

13. This then brings us to the work performed in the pallet yard. Originally the pallet yard was an outdoor facility located upon the Darlington site property but outside the fence which surrounds the power house and the construction site temporary buildings. At some point in time the outdoor facility was moved to a vacant building within the fenced portion of the Darlington power-house and the construction site temporary buildings.

14. In 1988 the only work performed in the pallet yard was the manufacture of pallets. In 1989 the work in the pallet yard consisted *primarily* of making pallets but also included certain other functions. Approximately, twenty-five percent of the work in the pallet yard in 1989 consisted of such other functions as untangling cables and removing cable clips from the cables, mak-

ing a few (approximately six) picnic tables, making signs and road barriers used for an open house, putting batteries in flash lights which were then given out as safety awards, the construction of some winter hoarding, and the disassembly of panels. In respect of this latter function it would appear that this was also a "make work" project as Hydro would normally merely scrap the panels. On the occasions when panels were disassembled at the pallet yard however, the lumber was stacked and either recycled or scrapped. Finally, on occasion during 1989 employees from the pallet yard would perform light duties on site. These occasions appear to be rare. Mr. Richards was not one of the employees assigned to work on site on any occasion.

15. In the manufacture of wooden pallets, Hydro used a significant amount of surplus wood from the site. Rather than scrapping wood which had been used in the construction work on site, materials were salvaged and used in the pallet yard. Mr. John Grunau, the Manager of Safety - Design Construction Branch, and one of the persons ultimately responsible for the rehabilitation program testified that an agreement was negotiated with Ontario Hydro Supplies and Services Department whereby that department would purchase the pallets made at the pallet yard for \$10.00 per pallet. It would appear that from a strictly economical point of view the operation of the pallet yard was not very successful. Although sold at ten dollars per pallet, the pallets were estimated to cost about \$75.00 to produce. The economic viability of the pallet yard however was not the main or even a primary objective of the rehabilitation program. From all accounts, the pallet yard rehabilitation program was commenced from a "win-win" perspective - injured workers would be provided with an opportunity to return to useful, gainful employment and Hydro would be able to control a portion of its ever increasing workers compensation cost.

16. The pallets made at the pallet yard were generally transported via the Darlington site warehouse to Ontario Hydro's Supplies and Services main warehouse at Kipling Avenue in Toronto. From there they would be distributed throughout the province to Ontario Hydro sites and locations. Some of the pallets were used at the Darlington site.

Submissions of the Parties

17. In their submissions counsel referred to the following provisions of the collective agreement:

Article 1

RECOGNITION

- 1.1 EPSCA recognizes the Council as the exclusive bargaining agency for a bargaining unit comprising *employees as defined in Section 1.4* and foremen as defined in Section 1.5 engaged in all *construction industry work** performed in the Province of Ontario Hydro property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities.

For the purpose of clarity, the bulk system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50 kV), transmission stations, microwave and repeater stations.

* For the purpose of The Electrical Power Systems Construction Association, the work performed is deemed to be under the responsibility of the Generation Projects and Transmission Systems Division.

[emphasis added]

- 1.3 The Council recognizes EPSCA as the exclusive bargaining representative for all

Employers in respect of work performed by their respective employees in the bargaining unit set forth in Section 1.1.

- 1.4 The term "employee" shall include all employees of the Employers in the classifications set out in the trade appendices provided in Article 4, Sections 4.1 and 4.2, save and except those described hereunder:
- (a) Carpenters and Labourers employed by an Employer signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement; and
 - (b) Operating Engineers employed by an Employer signatory to the Crane and Equipment Rental Agreement with Local Union 793, when performing work covered by the scope of that agreement; and

The term "employee" includes foremen in Articles 13, 15, 16, 17, 18, 19, 20, 21, 22, 12, 24, 25, 26.1(b), 26.1(c) and 28.

Article 4

APPENDICES

- 4.1 The trade appendix applicable to each member Union of the Council will contain those provisions which are not common to all members Unions of the Council, and those provisions will apply to appropriate members of each International Union as provided in its appendix while they are working under the terms of this Collective Agreement. Such appendices shall be deemed to be part of this Agreement.
18. Counsel also referred to section 1(1)(f) of the Act which states as follows:
- "construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof;
19. Counsel for Hydro asserted that in order for Mr. Richards to be covered under the agreement he must meet the twofold test set out in Article 1. Mr. Richards must be an employee as defined in Article 1.4 of the agreement *and* he must have been "engaged in construction industry work performed ... for the bulk power system." Counsel submitted that the collective was unambiguous and Mr. Richards did not meet either of these two tests.
20. Counsel argued that through a combination of Article 1.4 and Article 4 it is clear that the collective agreement applies only to employees in classifications set out in the Labourers appendix "while they are working under the terms of the collective agreement". Thus, the collective agreement contemplates that there may be occasions when employees are *not* working under the terms of the collective agreement.
21. Counsel for Hydro pointed to the fact that Article 1 of the Labourers appendix to the master agreement entitled "Classifications" contained approximately 53 separate classifications "covered by this appendix". Although many of these classifications are very specific counsel noted that there was no classification for "pallet yard worker" or "pallet builder". Moreover, counsel stated that although Article 1.2 of the appendix specifies that "if additional classifications are required, they will be negotiated as appropriate for work in the electrical power systems sector" no such negotiations occurred in respect of a "pallet worker" classification. Counsel attributed this to the fact that the parties did not intend the new classification of pallet yard worker to be covered under the collective agreement. In the result it was argued that Mr. Richards was *not* an employee as defined in Article 1.4.

22. It was further submitted that Mr. Richards did not meet the second criteria contained in the recognition clause as he was not "engaged in construction industry work performed for the bulk power system". In this regard counsel referred in particular to the evidence of Mr. Grunau who testified that the manufacture of pallets was not construction work and did not contribute to the "bulk power system" as that term is used and defined in the recognition clause. Reference was also made to the definition of "construction industry" found in section 1(1)(f). It was submitted that the manufacture of pallets was not work included within that definition. Counsel therefore asserted that the union had not met the onus cast upon it to prove that Mr. Richards was covered by the unambiguous language of the collective agreement.

23. In the alternative counsel for Hydro argued that there was a latent ambiguity in the language of the collective agreement. That ambiguity could be resolved by extrinsic evidence which, he asserted, showed that the agreement did not apply, and was never intended by the parties to apply to persons working in the pallet yard.

24. Counsel pointed to a number of factors as relevant extrinsic evidence which the Board should consider in resolving the ambiguity. First, he noted the purpose of the program. Second, he referred to the fact that employees came to work at the pallet yard through recommendation of the Workers' Compensation Board and not through the application of seniority or the union hiring hall. Next counsel observed that the evidence indicated that Hydro did not expect the pallet yard employees to meet any productivity or attendance criteria and to this extent the collective agreement was not applied to persons working in the pallet yard. Counsel also referred to the fact that unlike other labourers on site, pallet yard employees worked only one shift rather than three shifts. They were also permitted to start and leave work five minutes ahead of the other employees. As a fifth factor counsel argued that the work in the pallet yard was geographically removed from the construction work face at Darlington as it was originally outside the fence which surrounds the Darlington power house. Even when the pallet yard was moved within that fenced area it continued to be physically removed from the work face.

25. Counsel further argued that in resolving the ambiguity the Board must consider the work actually performed in the pallet yard and how that work compares to the work which is performed by those construction labourers clearly covered by the agreement. Counsel asserted that the evidence disclosed that the manufacturing of pallets is not normally done by construction labourers on a construction site and is not generally perceived as being construction work. He again referred to section 1(1)(f) of the Act and argued that the manufacture of pallets did not fall within the statutory definition of "construction industry" work. Counsel emphasized that, except for the employees in the pallet yard, no other labourer (or any other employee) had ever built or manufactured pallets at Darlington. Indeed the evidence of the witnesses went even further and was to the effect that in their respective years working within the construction industry generally, or at Darlington in particular, they had not observed labourers constructing pallets on site. Counsel again pointed to the fact that the agreement did not contain a "pallet builder" classification although it contained 53 other classifications.

26. Counsel for the Labourers argued that the evidence disclosed that Hydro "understood and intended the collective agreement to apply" to pallet yard employees. Counsel submitted that in determining whether Mr. Richards was covered by the agreement while working in the pallet yard, the focus should not merely be on a narrow determination of whether or not the production of pallets was "construction" work or fell within the statutory definition of "construction industry" as found in section 1(1)(f) of the Act. Rather, he asserted that the pallet yard operation was an "integral part" of the personnel practice employed by Hydro in the operation of its construction industry business, namely, the construction of the Darlington nuclear plant. He argued that the

rehabilitation programme at Darlington, including the pallet yard, was only a small part of Ontario Hydro's overall undertaking to construct Darlington. It was submitted that it would be unreasonable to sever this small part from the overall undertaking and find that this was not construction work.

27. Counsel also maintained that the work at the pallet yard fell within the responsibility of the "Generating Projects and Transmission Systems Division" (now called the Design and Construction Branch) at Hydro. That is the operating division of this employer which is recognized in the collective agreement to perform construction work. Thus Mr. Richards was employed by the division which Hydro agrees is engaged in the construction industry. He was not employed by a separate division with a distinct undertaking i.e., to manufacture pallets. It was submitted that even if the manufacture of pallets did not fall within the statutory definition of "construction industry", the collective agreement between these parties had amended and enlarged that definition so that work performed by the Generating Projects and Transmission Systems Division was agreed to be construction industry work. That work must necessarily include the work performed by Mr. Richards an employee working at the construction site for that division.

28. Finally, counsel for the Labourers noted that the pallets were manufactured *at* the construction site and some were subsequently used on site. He asserted that the pallet yard employees were akin to on site shop employees.

The Decision

29. It is a well established rule of interpretation that where the words of a collective agreement are unambiguous they must be given their ordinary meaning without recourse to extrinsic evidence. Where the words on the face of the agreement are ambiguous it is said that a patent ambiguity exists and recourse to extrinsic evidence may be made to assist in interpreting the collective agreement.

30. At times the words on the face of the agreement are not ambiguous but application of those words to the facts is "doubtful" or "difficult". In those instances it is said that there is a latent ambiguity. Where an ambiguity is latent it is permissible to refer to extrinsic evidence to resolve the ambiguity. It is also well established that it is permissible to rely upon extrinsic evidence to disclose whether there is any latent ambiguity. As was stated by the Ontario Court of Appeal in *Leitch Goldmines Limited et al. v. Texas Gulf Sulphur Company (Inc.) et. al.* (1968) 3 D.L.R. 3d 161 at page 215-216:

The Court is not necessarily concerned only with the literal meaning of the language used but rather with its meaning in the light of the intentions of the signatories....

A transaction having been reduced to writing, extrinsic evidence is generally inadmissible to contradict, vary, add to or subtract from its terms. This is fundamental in the interpretation of written instruments. Parol evidence may, however, be admitted in aid of interpretation.

Where the language of the document and the incorporated manifestations of initial intention are clear on a consideration of the document alone and can be applied without difficulty to the facts of the case, it can be said that no patent ambiguity exists. In such a case, extrinsic evidence is not admissible to affect its interpretation. On the other hand, where the language is equivocal, or if unequivocal but its application to the facts is uncertain or difficult, a latent ambiguity is said to be present. The term "latent ambiguity" seems now to be applied generally to all cases of doubtful meaning or application.

Extrinsic evidence may be admitted to disclose a latent ambiguity, in either the language of the instrument or in its application to the facts, and also to resolve it, but it is to be noted that the evidence allowed in to clear up the ambiguity may be more extensive than that which reveals it.

Thus, evidence of relevant surrounding circumstances can be accepted to ascertain the meaning of the document and may clarify the meaning by indirectly disclosing the intention of the parties.

If the surrounding circumstances, however, do not explain the latent ambiguity an equivocation is said to be established, in which event, in addition to evidence of circumstances, direct evidence of the parties' intentions may be received to resolve the equivocation.

(See also *Noranda Metal Industries Limited, Ferguson Division and International Brotherhood of Electrical Workers, Local 2345 et. al.* (1984) O.R. 2d. 529 (Ct. of Appeal); *Re International Union, United Automobile, Aerospace and Agricultural Implement Workers, Local 1967 and McDonald Douglas Canada Limited*, (1984) 47 O.R. 2d 78 (Ont. Divisional Court); *The Brant County Board of Education*, [1984] OLRB Rep. Oct. 1349.

31. In our view the words of the collective agreement are not ambiguous. The agreement on its face applies only to those employees of the employer in the classifications set out in the agreement who are engaged in construction industry work on Ontario Hydro property for the bulk power system.

32. The application of that language to the facts before us however is "uncertain or difficult" and discloses a latent ambiguity. It is "doubtful" (and certainly disputed) whether Mr. Richards was employed in the classification set out in the appendix, and it is "doubtful" (and certainly disputed) whether he was engaged in "construction work". The revelation of this latent ambiguity therefore permits us to refer to the extrinsic evidence to ascertain the meaning of the collective agreement and resolve the ambiguity.

33. Both counsel referred to section 1(1)(f) of the Act. It is not unusual for arbitrators interpreting collective agreements to look at the legislative context in which a collective agreement is set for assistance in determining the meaning of the words used in the agreement. The definitions of certain terms found in the statute may aid in interpreting those same terms where they are found in the agreement. The definitions found in statutes do not however automatically provide meaning to the words in the collective agreement.

34. It is important to recognize that in this instance the Board is adjudicating in its capacity as a board of arbitration under section 124 of the Act. Our role therefore is to hear and determine the difference between the parties to the collective agreement arising from the interpretation, application, administration or alleged violation of that collective agreement. The issue before us is *not* whether the work performed by Mr. Richards is work in the "construction industry" as that term is defined in the Act. Rather, the issue is whether the work which Mr. Richards was performing fell within the parameters of the collective agreement. As a result, although we have considered the statutory definition we find that it is but one of many factors to consider.

35. Was Mr. Richards an "employee" as that term is used in the agreement? We find that he was. Although there is no separate classification for "pallet manufacturer" or "pallet builder" contained in the Labourers' Appendix there is a separate classification entitled "labourer". In our view this classification is broad enough to encompass an employee performing the work Mr. Richards was performing in the pallet yard. In the circumstances of this case we find Mr. Richards to be an "employee" within the meaning of Article 1.3 and Article 4 of the agreement.

36. This then brings us to the issue of whether Mr. Richards was engaged in "construction industry work". That issue is much more difficult to resolve. On its face and without regard to any surrounding circumstances it is difficult to characterize the manufacture of pallets in a "production like" or "assembly line like" fashion as "construction industry" work if that is the only function

carried out by the employees of the employer. On the other hand, if construction labourers on a construction site build *some* pallets for use on the site it is not difficult to characterize that work as construction industry work. One cannot therefore equivocally say that the building of pallets is or is not construction industry work.

37. We agree that the mere fact that some of the pallets produced in the pallet yard at Darlington were actually used on the construction site is not sufficient to resolve this matter. There are a myriad of items, tools or materials used on a construction site. If the fact that the ultimate products is used on a construction site or eventually becomes part of the construction project were the determinative criteria, there would be little if anything which would not be considered "construction work". Such a criteria would, for example, make the manufacturer of nails which were then used in constructing a structure "construction work".

38. Similarly, we also agree that the mere fact that an employee is employed by the construction industry division of the employer does not necessarily result in the finding that such an employee was engaged in construction industry work. One can readily envision a number of persons including, for example office staff, employed by a construction industry employer who are not engaged in construction industry work and/or who are not covered by the collective agreement which covers the construction employees. The fact that Mr. Richards was employed by the Generating Projects and Transmission Systems Division is therefore also not sufficient to resolve this matter. The fact that Mr. Richards performed this work *at* a construction site *for* a construction industry employer are two but certainly not the primary factors to consider.

39. The remainder of the evidence does assist us in ascertaining the meaning of the term "construction industry work" as used in the agreement. In our view the surrounding circumstances clarify the meaning of that term and show that the parties applied and intended to apply the agreement to persons employed in the pallet yard.

40. While employed at the pallet yard employees were treated in much the same manner as those construction labourers on site who were clearly covered by the collective agreement. Pallet yard employees were paid the same wages and had union dues deducted from their pay. Health, welfare and pension remittances were made on their behalf. Employees in the pallet yard were afforded union representation. They filed grievances which were dealt with in accordance with the grievance procedure set out in the agreement. A meeting of management and all pallet yard employees to discuss concerns relating to working conditions was arranged in consultation with on site union representatives. Both the Labourers' and the Carpenters' chief stewards attended that meeting.

41. In addition to these factors, it is apparent from the evidence before us that in the pallet yard Hydro attempted to observe the "trade" or work jurisdictions of the respective trade unions who together make up the Council as set out in the agreement. Thus carpenters normally performed those work functions over which their craft union claimed jurisdiction i.e. sawing and nailing wood, while labourers such as the grievor performed such typical labouring functions as "tending" carpenters by supplying them with materials or laying out their tools. Indeed, it was because the Carpenters' union expressed concern that in the pallet yard work within their trade jurisdiction was being performed by labourers that Mr. Richards (and certain other labourers) were laid off. The possibility of a jurisdictional dispute over work assignments in the pallet yard was one of the factors considered by Hydro in laying off certain labourers including Mr. Richards in November 1989. Consideration of the "work jurisdiction" clause in the agreement is another indicator that Hydro intended the agreement to cover pallet yard employees.

42. The only substantial areas where the collective agreement was apparently not applied to

the pallet yard employees was with respect to their entry into the pallet yard and the matter of discipline for poor attendance or poor productivity. In our view however the fact that employees came to the pallet yard through the referral of the Workers' Compensation Board and not by way of seniority or the union hiring hall is less significant in light of the evidence that union dues were deducted from the employees and appropriate remittances for benefits were made to the union on their behalf. We find the fact that Hydro chose not to enforce the productivity and attendance standards which is normally expected of those non injured workers clearly covered by the collective agreement to be, at best, a neutral factor. The fact that Ontario Hydro waived its right to require employees to be fit and able does not show that it did not intend the agreement to apply to those employees.

43. Based on these various factors we are therefore of the view that the surrounding circumstances indirectly disclose the intention of the parties that the collective agreement does apply to pallet yard employees. That extrinsic evidence clarifies the latent ambiguity.

44. Finally we turn to the direct evidence of the parties' intentions. In his submissions counsel for Hydro referred to the lack of evidence from any representative of the Labourers with respect to the trade union's interpretation or understanding of the application of the collective agreement to pallet yard employees. In this regard counsel argued that the evidence of the representatives of Hydro indicated that Hydro intended the pallet yard to be outside the scope of the collective agreement and acted accordingly. It was argued that there was no evidence from any representative of the Labourers' union to contradict that evidence. Representatives of the union did not testify that their interpretation or intention was different than that of Hydro.

45. If the evidence of the witnesses who testified on behalf of Hydro had clearly or unequivocally established that the intention of Hydro was to exclude the pallet yard employees from the collective agreement there would have been much merit in this submission. In our view however even the direct evidence of the parties' intention tendered by the witnesses on behalf of Hydro was not so unequivocal. In cross-examination Mr. Verwoert, the general foreman responsible for the pallet yard employees at the relevant time admitted that in his duties he had always treated the pallet yard employees as if they were covered by the agreement stating "I did. I had nothing to believe they were not [covered by the agreement]." Mr. Grunau also stated that the pallet yard employees were "more or less" treated exactly as other employees on site and admitted that he had never turned his mind to the question as to whether such employees were covered by the agreement. That evidence is inconsistent with an assertion that Hydro intended the employees to be beyond the coverage of the agreement.

46. We therefore do not view as fatal the failure of the trade union to call one of its representatives to testify that the union's understanding and intent was that pallet yard employees be covered by the collective agreement. The equivocal evidence of Hydro's witnesses was refuted by the evidence of such surrounding circumstances as a deduction (and remittance) of union dues and the fact that the union otherwise represented pallet yard employees. The fact that the union represented pallet yard employees at meetings with management and in grievances filed, and the fact that the union accepted dues on behalf of these employees is sufficient evidence that it intended the collective agreement to apply to such employees. That direct evidence of the union's intent prevails over the equivocal evidence with respect to Ontario Hydro's intentions.

47. For all of these reasons we find that at the time of his layoff Mr. Richards was covered by the collective agreement. Ontario Hydro has conceded that he was laid off in violation of that agreement. The grievance is therefore allowed. The parties indicated that in the event the grievance was allowed they may be able to resolve the issue of remedy. We will remain seized in the

event the parties are unable to resolve that matter. At this stage we make no order as to the appropriate remedy.

1559-90-U Irene Gauthier, Complainant v. I.W.A.- Canada Local 1-1000, Respondent

Duty of Fair Representation - Strike - Unfair Labour Practice - Union's refusal to provide "strike pay" to a member is an internal matter which does not involve the representation of a bargaining unit employee in relation to employer - Complaint not under Board's jurisdiction to deal with fair representation complaints - Complaint dismissed

BEFORE: Robert D. Howe, Vice-Chair.

DECISION OF THE BOARD; September 27, 1990

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that she has been dealt with by the respondent contrary to section 68 of the Act. The gist of her complaint is that on or about July 6, 1990, Margaret Robitaille, the respondent's Chairperson, refused to provide "Strike Pay" to the complainant when distributing "Strike Pay" cheques to other members of the respondent. (It appears from the complaint that the reasons given for the refusal were that the complainant "drove scabs around" and "didn't picket".) The relief sought by the complainant is "that she be paid 2 weeks additional 'Strike Pay' (equalling \$200.00) that was paid to other Union Members following Strike."

2. Section 68 of the Act provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

3. It is well established in the Board's jurisprudence that for the Board to find a breach of section 68 of the Act, the union's impugned acts or omissions must involve the representation of a bargaining unit employee in relation to his or her employer. See, for example, *Angelo Moro*, [1983] OLRB Rep. Aug. 1354, at paragraph 3, in which the Board wrote, in part, as follows:

.... The Board has consistently ruled in past decisions, that the duty of fair representation in section 68 is concerned only with the representation by a trade union of an employee in relation to his or her employer.

4. The Board has only such jurisdiction as has been conferred upon it by statute. It has no authority under section 68 of the *Labour Relations Act* (or any other statutory provision) to undertake a general watchdog role in respect of internal trade union processes. As the Board observed in *Arthur Joseph Roberts*, [1974] OLRB Rep. March 169, at paragraph 8:

... the propriety of a trade union's behaviour vis-a-vis its members is governed by its constitution and by-laws and the procedural remedies provided therein. And recourse must be made by an aggrieved member to the governing rules provided under the constitution for relief. The safe-

guard provided by the controlling supervision of the Courts [is] his assurance that these rules will be implemented fairly and impartially.

See also *Ronald Lewszoniuk*, [1984] OLRB Rep. Jan. 48; *Angelo Moro*, *supra*; *Sylvia Colalillo*, [1982] OLRB Rep. July 1066; and *Frank Manoni*, [1981] OLRB Rep. Dec. 1775.

5. Complaints concerning removal from union office (*Arthur Joseph Roberts*), eligibility to run for union steward (*Sylvia Colalillo*), and irregularities in the administration of union pension funds (*Angelo Moro*) have all been treated as purely internal union affairs beyond the ambit of the Board's jurisdiction under section 68 of the Act. A trade union's refusal to provide "Strike Pay" to a member is also an internal matter which does not involve the representation of a bargaining unit employee in relation to his or her employer. Thus, it does not fall within the scope of the Board's jurisdiction under section 68 of the Act. Consequently, assuming that all of the allegations contained in the complaint are true and provable, the Board would not have the power to grant the relief requested by the complainant.

6. For the foregoing reasons, this complaint is hereby dismissed pursuant to section 71(1) of the Board's Rules to Procedure, which provides:

Where an application or complaint does not, in the opinion of the Board, make out a *prima facie* case for the remedy requested, the Board may dismiss the application or complaint without a hearing and it shall in its decision state the reason for the dismissal.

0768-90-U John Kohut, Complainant v. The National Automobile, Aerospace and Agricultural Implement Workers' Union of Canada (C.A.W.-Canada) and its Local 303, Respondent, v. General Motors of Canada Limited, Intervener

Charter of Rights and Freedoms - Evidence - Natural Justice - Practice and Procedure - Complainant asserting right to tape record proceedings and to rely upon recording as "transcript" - Complainant alleging Board's failure to keep official transcript a violation of common law, natural justice, and "fundamental justice" requirement of section 7 of *Charter* - No requirement in *Labour Relations Act* or *Statutory Powers Procedure Act* that Board produce official transcript - No common law or natural justice requirement - Board not persuaded section 7 of *Charter* raises obligation - Transcript unnecessary for judicial review applications given finality of Board decisions - Adoption of practice would interfere with expeditious and efficient resolution of labour relations disputes - Board exercising discretion to permit complainant to make unobtrusive personal recording subject to restrictions - Recording not official record and standing no higher than a party's notes for all purposes

BEFORE: S. A. Tacon, Vice-Chair.

APPEARANCES: Harry Kopyto for the applicant; Robert E. Tindale, Robert J. Ryan, Pat Clancy and Richard Fleming for the respondent; E. T. McDermott, Dave Dimartile and Margaret Szilassy for the intervener.

DECISION OF THE BOARD; October 5, 1990

1. The style of cause is hereby amended to add "General Motors of Canada Limited" as the intervener in this proceeding.

2. This is a complaint pursuant to section 89 of the *Labour Relations Act* alleging violation of section 68.

3. Several preliminary motions were made by the parties. Those motions are first summarized. The complainant's representative asserted a right to make a tape recording of the proceedings notwithstanding the objection of the respondent and intervener. Further, the complainant's representative contended that the Board lacked jurisdiction to proceed in the absence of an official recording of events. Counsel for the intervener sought dismissal of the complaint on several grounds, including the delay involved in filing the complaint, the lack of *prima facie* case and the nature of the relief claimed. With respect to this last ground, counsel for the intervener requested clarification of the precise relief the complainant was seeking.

4. The Board heard submissions with respect to the complainant's two preliminary motions, both opposed by the other parties, and herein gives its decision on those matters. A date was set for continuation of the proceedings to hear argument on the preliminary motions raised by the intervener. In that regard, the complainant's representative was directed by the Board to submit the relief requested in writing and he did so as follows:

Relief sought by the Complainant

1. The right to reinstatement with full compensation for lost income and benefits, or compensation in lieu of reinstatement.
2. A positive letter of recommendation and expunging all references to dismissal of complainant.
3. In the alternative to 1 above, new grievance hearings and proceedings from the first stage onwards up to and including arbitration, if required; an order excluding introduction of criminal transcripts in such proceedings, or in the alternative - releasing complainant from all obligations or undertakings given on his behalf by the Respondent CAW regarding evidence to be admitted on arbitration or in grievance proceedings.
4. An order adding the Intervener Employer as a party Respondent to these proceedings on the basis collusion with the Respondent CAW in denying s. 68 rights and for purposes of granting the relief sought, if required and requested.

5. The arguments of the parties with respect to the two preliminary motions raised by the complainant's representative are set out in an abbreviated form.

6. With respect to the first motion, the complainant's representative sought to make a tape recording of the Board proceedings, unobtrusively, as an aide memoire, while reserving the right to produce and rely on a "transcript" based on that recording in the event of a dispute during the testimony of a witness or in submissions. The complainant's representative argued that it was premature to decide if the tape recording could be played back to a witness or during submissions. Such a determination, it was submitted, should only be made if a dispute arose and the complainant's representative sought to play the tape. It was contended that any difficulties with respect to

the integrity of the tape and its accuracy could be resolved by the Board in a proceeding akin to a voir dire. A decision of the Ontario Public Service Relations Tribunal, *Glenny and Ontario Public Service Employees Union, et al* (T/0001/89, unreported June, 1990), was cited in support.

7. Counsel for the intervener argued that it was extraordinary to permit one party to record proceedings, perhaps selectively, in contrast to a complete transcript produced by a certified court reporter. Counsel stressed the intimidating effect of such a recording on witnesses and the potential that such recordings would destroy the labour relations climate between the parties. It was asserted there was no legal requirement to permit such a recording and traditional methods of note-taking had proved sufficient.

8. The respondent's representative generally adopted the intervener's submissions, emphasizing the intimidating effect of tape recording the testimony of the witnesses and the difficulty in establishing the veracity of a recording made by one party. It was argued that the Board had control of its practice and procedure and that there was no legal requirement to permit a recording.

9. With respect to the second motion, the complainant's representative argued that the Board lacked jurisdiction to proceed in the absence of a reporter transcribing the evidence in some acceptable fashion. It was noted that courts of record are required by statute to produce a transcript and some tribunals also operate with official transcripts of proceedings even though those tribunals often deal with less "important" issues and are not required to do so by their enabling statutes. Some examples were given. The complainant's representative then asserted that the overwhelming majority of quasi-judicial tribunals maintain an official record of proceedings, notwithstanding the absence of a statutory obligation to do so, on the grounds of "justice". He acknowledged that the Board to date has not produced transcripts but submitted there was no legal impediment to so doing in the *Statutory Powers Procedure Act* and, further, section 7 of the *Charter of Rights and Freedoms* now required such transcripts as a matter of "fundamental justice". In this regard, the *Glenny* case, *supra*, was distinguished as the cases referred to therein pre-dated the *Charter*. In the alternative, it was contended that the absence of a Board transcript violated the common law principles of natural justice applicable to the Board, especially the right to be heard, to cross-examine, and to make a full defense or answer. The complainant's representative submitted there were a number of advantages to the Board's recording of proceedings, including: increased speed of the hearing in that the tribunal need not take notes in longhand; facilitating litigation at judicial review through avoidance of affidavit evidence; fairness to parties who cannot afford to retain private court reporters; clarity, succinctness and integrity would be added to the quality of the evidence. With respect to the costs involved, he argued that the Board was a creature of government, that there were no strict financial constraints precluding the Board from retaining an official transcriber if the Board considered it appropriate to incur such expense and the government could readily provide the money through lottery proceeds, for example. In any event, the costs must be weighed against the effective regulation of labour relations rights. He disputed any assertion that a record would stand in the way of an expeditious hearing and argued that, in lengthy hearings involving many witnesses, the Board would benefit from an official record. It was also suggested that a recording would impress on the witness the need to tell the "truth" as his or her words could be reread or played back. Finally, the complainant's representative submitted that, even if an official record was not required by the *Charter* or natural justice at common law, the Board should exercise its discretion to do so for the reasons already given.

10. Counsel for the intervener submitted, that pursuant to section 102(13) of the Act, the Board could determine its practice and procedure and, thus, had the authority to maintain a record of proceedings in the form of a transcript. Counsel submitted that reasons of expedition, cost and

informality led the Board not to establish that practice. It was argued that confrontational aspects of Board proceedings should be minimized in the interests of the parties' ongoing relationship, in contrast to civil litigation, for example. That is, formal transcripts were not in the interests of harmonious industrial relations. Counsel disputed the assertion that transcripts would involve insignificant costs and would not interfere with the expeditious hearing of the dispute. For example, counsel noted that there would be a delay involved in the production of transcripts before cross-examination. With respect to the *Charter* argument, counsel submitted that notice to the Attorney General of Ontario had not been given nor was there an application to the courts and, thus, that issue could not be argued before the Board. In any event, the section 7 guarantee of "life, liberty and security of the person" was unrelated to the maintenance of an official transcript by the Board.

11. The respondent's representative argued that the Board had the authority to determine whether an official transcript should be produced and could so decide in appropriate cases. There was no statutory requirement to keep such a record, however, nor had the case law so compelled a transcript on other grounds. Hence, the Board was urged to reject this preliminary motion of the complainant.

12. In reply, the complainant's representative argued that notice to the Attorney General was not required as he was not seeking to have section 102(13) of the Act declared null and void and that section did not preclude the producing of a transcript. The Board was competent to determine the section 7 Charter argument, it was submitted. The complainant's representative reiterated his submissions that the costs involved were minimal, delay could be avoided through the production of transcripts on short notice and an official transcript was not logically related to increased confrontation or formality.

13. The Board regards it as appropriate to first consider the second preliminary motion to the effect that the Board is required to produce a transcript or should exercise its discretion to so do so and, thereafter, the motion that the complainant's representative be permitted to tape record the proceedings.

14. There is no requirement in the *Labour Relations Act* that a transcript of Board proceedings be maintained; that was not disputed by the complainant's representative. In this respect, the Board's enabling statute stands in contrast to the inclusion of such an obligation in the legislation governing the Ontario Human Rights Commission or the Discipline Committee of the Law Society of Upper Canada. The *Statutory Powers Procedure Act* (the SPPA) does contemplate the possibility of a transcript. Section 20 of the SPPA reads, in part:

20. A tribunal shall compile a record of any proceedings in which a hearing has been held which shall include,

...

(e) the transcript, if any, of the oral evidence given at the hearing;

...

Thus, as was also not an issue, the SPPA does not oblige the Board to produce a transcript of its proceedings. The complainant's representative did not refer to any authorities in support of his assertion that a verbatim record of tribunal proceedings was required at common law or that failure to do so constituted a denial of natural justice. Nor did he refer to or attempt to distinguish those cases which contradicted his position. In the Board's view, there is no requirement at common law that, as a matter of natural justice, a tribunal must prepare an official transcript of the proceedings: *R v. Northumberland Compensation Appeal Tribunal; ex parte Shaw*, [1952] 1 A11

E.R. 122; *Re United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and Reynolds* (1976), 68 D.L.R. (3d) 81; *Grain handlers Union No. 1 v. Grainworkers Union, Local 333, C.L.C. et al.*, [1978] 1 F.C. 762; *Blagdon v. Public Service Commission*, [1976] 1 F.C. 615 (C.A.); *Town of Bridgewater v. Ross* (1970), 2 N.S.R. (2d) 766 (N.S.S.C.); *International Association of Heat and Frost Insulators and Asbestos Workers, Local 110 v. Construction and General Workers' Union, Local 92 and Associated-Kellog Ltd.* (1986), 70 A.R. 228 (C.A.); *B.S.O.I.W. v. Canron Inc. and Alberta Labour Relations Board* (1983), 43 A.R. 229 (Q.B.); *Thompson v. Calgary Police Commission* (1987), 90 A.R. 193 (Q.B.).

15. The Board need only briefly deal with the argument that section 7 of the Charter requires the Board to make a transcript of its proceedings. Section 7 provides:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

With respect to the right of the complainant's representative to raise this argument, the Board is prepared to assume for purposes of these proceedings, without deciding, that, as the constitutional validity or constitutional applicability of the *Labour Relations Act* is not in question, notice to the Attorney General of Ontario need not be given. The Board is prepared to consider the proposition asserted on this basis. Beyond the assertion that section 7 obliged the Board to make a verbatim record, the complainant's representative did not refer the Board to any authority which was directly on point or even remotely analogous. Nor did he provide a cogent analysis of the section in relation to the *Labour Relations Act* and the Board's authority and practices thereunder. The Board fails to see a logical connection between the "life, liberty and security of the person" and a purported resultant obligation on the Board to make a verbatim record. Since the Board is not persuaded that section 7 of the *Charter* imposes any such obligation, the *Charter* argument cannot succeed.

16. The Board next considers whether the Board, as an exercise of its discretion, should maintain a verbatim record of its proceedings. By virtue of section 102(13), the Board is entitled to determine its practice and procedure. Since its inception in 1944, the Board has conducted oral hearings but has not produced transcripts of its proceedings. Moreover, since the decisions of the Board are final and binding and are not subject to a right of appeal to the courts (sections 106(1) and 108 respectively), maintenance of a verbatim record by the Board has been unnecessary. The more limited scrutiny of the courts through judicial review applications does not require a record in the form of a transcript. It is interesting to note that the Canada Labour Relations Board abandoned its practice of maintaining a verbatim record once the right of appeal from its decisions was replaced by the more narrow scope of judicial review. Of the difficulties occasioned by the preparation of a verbatim record and the labour relations considerations favouring abandoning that practice once the scope of review by the courts was narrowed by statute, the Canada Labour Relations Board had this to say in *Canadian Merchant Service Guild and Canadian Pacific Limited*, [1983] 3 Can LRBR 87:

On the question of recording proceedings at Board hearings the Board followed the practice of its predecessors. The primary purpose was to have available to the Federal Court of Appeal, should one party wish it, a transcript of Board proceedings to scrutinize to determine if a Board decision was reviewable under section 28(1)(b), an error of law not on the face of the record or 28(1)(c), an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before the Board.

A price was paid for this practice. The Board's physical set up at a hearing discouraged non-legally trained persons from appearing. The presence of microphones and recordings intimidated employees and employer and union representatives. Fearful of being "caught in a slip-up" and wary of the "technicalities of the law" they chose to speak through legal counsel, who in turn aware of the record spoke "for the record". Objections and preliminary skirmishes far removed

from the labour relations problem became the model of behaviour. All of this led the Board further from the original vision of the Board as a forum for labour relations principals - employees, employers and unions - not a court or forum for lawyers. It prolonged proceedings and allowed parties to delay - the tool that can unhinge a situation to advantage.

The Board was aware of these adverse effects from its own experience. It also began to receive complaints across the country. Some parties volunteered to forego recording hearings to avoid expense to the Board and make the proceedings less formal. Others, including their counsel, made representations to abolish recording to avoid delays in judicial review proceedings. The Rules of the Federal Court allow withholding grounds for review until the record is filed with the Court. Where a transcript is added by Court direction that prolongs the time when a party may not know the grounds for review of a decision in its favour. At the same time, the Board was aware that on judicial review proceedings, transcripts were being asked for by affluent parties and not by others. This was occurring in the case of counsel and parties in areas, such as Ontario or British Columbia, where on similar proceedings from provincial labour relations boards there was no concern that proceedings were not recorded.

In 1977 and 1978 the Board was actively discussing the merits of continuing recording and discussing the practice with some provincial labour relations boards. On occasions when the Board acted on short notice, such as when there was an alleged illegal work stoppage or on occasions where recording was not available because of technical problems in the hotel or hall where a hearing was being held, or winter weather delayed arrival of equipment, the Board was impressed by the less technical and more problem solving attitude of the parties and their counsel. Neither affluent nor small union or employer nor counsel acting for them on these occasions argued the absence of recording adversely affected them. The Board was coming to the conclusion that the perceived benefits of recording were outweighed by its detrimental effects on Board proceedings and its emerging role as a broadly mandated labour relations problem solver. In 1978 the scope of judicial review of Board decisions was narrowed to section 28(1)(a) of the Federal Court Act (see section 122(1)). Parliament was recognizing the adverse delays occasioned by judicial review and the shift of roles from courts to the Board in the administration of labour relations law.

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Thus in the fall of 1979, [following the decision in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation* (1979), 79 CLLC 26 14,029 (S.C.C.)] the Board could give ascendancy to its objective of creating a better climate for labour relations problem solving at its hearing by discontinuing recording and avoiding the formality and regard for form over substance that accompanied recording. In so doing it knew it would please some communities which had advocated this approach and probably find disfavour in others. But this is a labour relations board not a labour court and our wish is to fulfil the objectives of the Code by bringing practical solutions to labour relations problems not merely by one gatepost in a long avenue of litigation.

For the same reasons we have decided not to allow one party to have recording facilities at a hearing. To do so will reintroduce, on a selected basis, the atmosphere we seek to eliminate by discontinuing recording and act contrary to the purposes we seek to achieve. Although we see and our experience has shown us little advantage during the conduct of the hearing, a recording may be of some advantage afterward. Otherwise why would a party want it? That advantage could be in written propaganda surrounding a dispute, or to play edited versions of the proceedings on radio or television, or to prepare future witnesses where there has been an exclusion of witnesses or adjournment, or for other reasons within the imagination of parties. The Board will not allow its proceedings and mediative efforts to be open to this potential for compromise.

17. Concerns with expedition, avoidance of delay and informality are echoed as well in the *Glenny* case, *supra*, and *Re Health Labour Relations Association* (1984), 17 L.A.C. (3d) 443 (Peck) in rejecting the proposition that a verbatim record should be maintained by the tribunal or arbitration board. [The latter case is referred to in more detail *infra*].

18. The complainant's representative argued that the hearings would proceed more expeditiously if a verbatim record was prepared as longhand notes need not be taken and the "clarity, succinctness and integrity of the evidence" would be enhanced through verbatim records provided

by the Board. The Board disagrees and notes those propositions run counter to the experience of the Canada Labour Relations Board and the views expressed in *Glenny*, *supra* and *Re Health Labour Relations Association*, *supra*. Even if verbatim recording permitted testimony to be received at a somewhat quicker pace, longhand notes would continue to be taken by the parties to assist in the conduct of the case and by tribunals to record their observations, assessments and evidence with the view to deciding the issues in dispute. To give but one example, tribunals could not await the production of a transcript to make evidentiary and procedural rulings during a hearing without incurring extraordinary delay. Further, decisions on the merits would be delayed as well. It was suggested that transcripts could be produced on short notice. Even if that were true in a particular case, the costs involved are not insignificant and to do so on a widespread basis would be extraordinarily expensive. Apart from any "expediting" of the production of transcripts, the costs of adopting a practice of a verbatim record would be quite considerable, given the Board's caseload. The complainant's representative dismissed this consideration on the basis that the government could readily allocate funds. It is not appropriate for the Board to respond to that proposition directly. Apart from this issue, in the Board's view, the production of transcripts would represent an incredible drain on the Board's financial resources and, critically, without any real benefit to the process resulting therefrom. Indeed, the Board concurs with the concerns expressed in the cases referred to that the adoption of such a practice would interfere with the expeditious and efficient resolution of labour relations disputes.

19. Moreover, a uniform practice of verbatim recordings of Board proceedings would introduce an unnecessary and unhelpful degree of formality to the proceedings. Labour tribunals have not adopted the formality of the judicial system in a number of respects. That decision is grounded on the premise that labour tribunals are intended to fulfil a different mandate. The relative informality of labour tribunal proceedings has increased accessibility and provided the flexibility needed to facilitate dispute resolution through voluntary settlements even in the context of adjudication.

20. The complainant's representative asserted that judicial review applications would be simplified if the Board prepared a transcript of its hearings and a transcript provided by the Board would be "fairer" to parties unable to afford court reporters. The Board does not conduct its hearings as a form of discovery for the parties or to encourage further proceedings. The Board, by statute, is to determine the matters in dispute and its decisions are final and binding. Neither does the Board regard its current practice as "unfair" to one or other party. Court reporters are present on behalf of a party in extremely rare instances. More importantly, all parties have an opportunity to take notes during the proceedings on the same basis.

21. Thus, the Board is not persuaded that a verbatim record of its proceedings should be maintained as an exercise of the Board's discretion and declines to do so.

22. More problematic is whether the Board must or should permit the complainant's representative to record the proceedings on tape. In the Board's opinion, to refuse that request would not be a denial of natural justice. In *Eastern Provincial Airways Ltd. v. Canada Labour Relations Board et al* (1983) 2 D.L.R. (4th) 597, 6 Admin L.R. 139, the Federal Court of Appeal concluded that the refusal to permit one party to make a verbatim record of the Canada Board's proceedings was not, *per se*, a denial of natural justice: see also *Re Canadian Merchant Service Guild and Canadian Pacific Limited*, [1980] 3 Can LRBR 87. At least one arbitrator has also refused to permit one party, where the other objected, to make a verbatim record of the proceedings, rejecting the assertion that such a refusal was tantamount to a denial of natural justice: *Re Stelco Inc. Hilton Works and United Steelworkers, Local 1005* (1988), 2 L.A.C. (4th) 219 (Haefling).

23. The *Courts of Justice Act, 1984* permits a tape recording of proceedings subject to certain conditions:

146(2) Nothing in subsection (1),

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(b) prohibits a solicitor, a party acting in person or a journalist from unobtrusively making an audio recording at a court hearing, *in the manner that has been approved by the judge*, for the sole purpose of supplementing or replacing handwritten notes.

[emphasis added]

24. In the *Glenny* case, *supra*, the Ontario Public Service Labour Relations Tribunal granted the request by one party to make use of a recording device. (The Board notes that the complainant's representative herein acted on behalf of the complainant in those proceedings.) The tribunal noted the use of such recording devices in court proceedings and that such a recording "stands on no different footing than a party's handwritten notes and does not constitute an official record of the proceedings". The tribunal concluded as follows:

The use of such a device shall not be permitted to interfere with the conduct of the hearing and will not, therefore, hamper the Tribunal in fulfilling its mandate under the *Crown Employees Collective Bargaining Act*. The possibility that a recording made in these circumstances could be used for an improper purpose is a matter which can be dealt with by the Tribunal at the appropriate time. This is not, however, a sufficient basis for denying the request to make such a recording.

25. The Board also notes the decision of a B.C. Arbitration Board in *Re Health Labour Relations Association*, *supra*, to refuse a request by one party to make an official stenographic record of the hearing but did permit a party to take notes through a stenographer or court reporter, for its own use, and subject to certain conditions. It is useful to set out the following passage from that decision:

The solemn responsibilities of an official court reporter, alluded to earlier, are reflected in the oath which that person takes upon certifying a transcript to be a thorough and accurate account of a proceeding. Because a certified court reporter's transcript can constitute the official record of proceedings, accuracy and comprehensiveness are essential ingredients to such a transcription. In recognition of the reporter's statutory obligations to be accurate, court etiquette accords the reporter a prominent position in the court-room, near enough to witnesses, counsel and judge so that which the reporter hears and records can safely be certified as an accurate transcript. Section 55 of the *Supreme Court Act* permits either party, at any time during a proceeding to request the reporter to read his notes aloud. Judicial etiquette similarly allows court reporters to request witnesses or counsel to speak louder or to repeat themselves so that transcript accuracy will not be compromised. In short, when a court reporter is present it is important that participants in a proceeding acknowledge the reporter's goal of perfect veracity, and co-operate by conducting themselves with this in mind. This is altogether consistent with the formal atmosphere of court proceedings and is accepted as a matter of course by participants in the judicial forum.

III

However, these proceedings do not take place in the court setting. They are interest arbitration proceedings occasioned by agreement of the parties. Arbitration is intended to be an inexpensive, informal and speedy mechanism for the resolution of labour disputes, whether these be rights or interest disputes, and thus, apart from arbitrations referred by court order, all procedural rules of court need not be respected. In the absence of procedural terms of reference submitted by the parties, or statutory procedural direction, the general rule is as stated by Aylesworth J.A. in *Re Walker and N. Grimsby*, [1958] O.W.N. 269 at p. 270 (Ont. C.A.):

Arbitrators, traditionally, have been allowed considerably more leeway as to procedure and as to the conduct of the proceedings than has been the case in the ordinary civil suit in litigation. This by no means entitles an arbitrator to disregard ordinary and clearly enunciated judicial principles, nor does it permit him non-judicial or biased conduct.

In other words, in the absence of procedural directives, submitted or statutory, an arbitration board is empowered to establish its own procedure, so long as that procedure satisfies fundamental legal requirements such as the duty to act in accordance with "natural justice". We understand our obligation to give the parties a fair hearing and to allow them adequate opportunity to present their case. We appreciate our duty to act honestly, without bias, and to conduct the proceedings in good faith and in the spirit of justice. But we also believe that arbitration proceedings must fulfil the important labour relations goal of speedy, informal dispute resolution, geared to the real substance of the matters at hand, and the involvement of laymen, rather than to procedural technicalities.

In our view, the presence of a court reporter with the attendant responsibility of preparing an official record would introduce an unnecessary element of formality to the arbitration proceedings, an element with the potential to inhibit and intimidate witnesses, laymen, advocates and perhaps even board members. The interference and interruptions which would necessarily flow from the reporter's need to ensure veracity we deem to be inconsistent with the fundamental nature and thrust of contemporary labour arbitration as it is practised both here and elsewhere. Moreover, we note that even in Supreme Court trial proceedings, the presence of a court reporter is not an essential element of a fair hearing; in the absence of a reporter the judge's notes constitute the true record of the evidence adduced at trial (ss. 38 and 39, *Supreme Court Act*).

IV

We conclude by reiterating that we have no objection to either party having a person (be it a stenographer or court reporter) present to furnish for its own use notes of these proceedings, provided that the notes are taken in an unobtrusive manner. However, the notes recorded and transcribed by this person shall not constitute an official transcript or record of these proceedings. The chairman's notes shall constitute the official record of the proceedings, except where the parties agree to the contrary or the board rules to that effect.

With regard to the taking of notes, the following requirements will prevail:

- (1) The note taker shall be physically situated in such a manner that she (he) does not intrude upon the line of vision of a witness.
- (2) The note taker shall not be entitled to interrupt the proceedings for any purpose including that of clarifying questions or answers given in these proceedings.

26. The Board has, in the past, permitted a verbatim recording of its proceedings by a qualified verbatim recorder where the parties have agreed and on the basis that the parties bear the costs involved preparing the transcript, including copies for the parties and the Board. Such a transcript has not constituted part of the official record of the proceeding. In the instant case, no qualified court reporter would be employed to make a verbatim record. Rather, the complainant's representative wishes to himself record the proceedings for his own use in lieu of handwritten notes but perhaps also to produce extracts in typed form or to play excerpts to witnesses or during submissions.

27. The Board need not reiterate the analysis grounding its conclusion that the Board should not exercise its discretion to make a verbatim record of the proceedings. The Board is not unmindful that some of those factors are relevant to the Board's decision whether or not to permit the complainant's representative to make a tape recording of the proceedings. However, it is a longstanding practice in Board hearings for the parties to take notes during the proceedings to assist in their conduct of the case. The Board is not persuaded that the unobtrusive recording of the proceedings on tape "for the sole purpose of supplementing or replacing handwritten notes",

to adopt the words of section 146(2)(b) of the *Courts of Justice Act, 1984*, should be treated differently. The Board concurs with the reasoning in the *Glenny* case, *supra*, that the possibility that a tape recording of the Board's proceedings may be used for an improper purpose is not a sufficient basis for denying a request to record the proceedings (cf, for example, *Canadian Merchant Service Guild*, *supra*, at pp. 95-96 where the potential for abuse was one basis for refusing to permit one party to tape record proceedings).

28. The Board does not agree with the position of the complainant's representative that a determination of the possible use of a tape recording should be deferred until he wishes to play excerpts to a witness or during submissions and that the Board could conduct a voir dire with respect to the integrity and accuracy of the tape at that point. Such a process would constitute an unwarranted intrusion into the Board's conduct of the hearing and, further, the Board, in that the tape recording would have been made in its presence, would be a witness to the matter in dispute (i.e., the integrity and accuracy of the tape). This situation is readily distinguishable from instances where the Board has permitted the introduction of a tape recording (otherwise admissible) of events which are themselves in dispute, that is, where the tape recording is a piece of evidence of a particular type and form: see *Royce-Dupont Poultry Packers*, [1989] OLRB Rep. May 492 and the cases cited therein.

29. Critical to the Board's decision to permit a tape recording is the requirement that any such recording be *unobtrusive*. That is, the taping of the proceedings will not be permitted to interfere with the Board's conduct of the hearing pursuant to its authority over its practice and procedure in section 106(13). The hearing, including the giving of testimony by witnesses, will be conducted as if no tape recording was being made. The tape recording may not be played back to a witness or during submissions. The complainant's representative may state orally to a witness (or to the Board, in submissions) his version of testimony given earlier and, if that version is disputed by another party, it is the Board's view which will be determinative. Such a process is consistent with the Board's longstanding practice. The fact that the complainant's representative may have utilized a tape recording as an aide memoire rather than longhand notes is irrelevant with respect to the Board's proceedings. Any such recording does *not* constitute an official record of the proceedings and stands no higher than a party's notes for all purposes.

30. For the foregoing reasons, the Board dismisses the preliminary motions of the complainant's representative other than to permit the complainant's representative (and any other party, if so desired) to make a tape recording of the proceedings on the basis stated above.

1213-89-U; 1224-89-U; 1225-89-U; 2034-89-U Prosper Brizzard, Richard Brizzard, Robert Casson, Richard Koski, David Jaggard, Manfred Krause, Robert Krause, David Ross, Aulius Tiiitto, Darrell Westover, Raynard Jacobson, Bruce Nordstrom and Larry Jaggard, Complainants v. **Wilf McIntyre**, Fred Miron, Roland Frayne, Niels Husman, Larry Duhaime and International Woodworkers of America - Canada Local 2693, Respondents; Gravel and Lake Services Limited, Complainant v. Roland Frayne, Neils Husman and Larry Duhaime, Respondents; Gravel and Lake Services Limited, Complainant v. International Woodworkers of America - Canada Local 2693, Respondent; Gravel and Lake Services Limited, Complainant v. International Woodworkers of America - Canada Local 2693, Fred Miron and Wilf McIntyre, Respondents

Bargaining Unit - Collective Agreement - Duty to Bargain in Good Faith - Final Offer Vote - Strike - Unfair Labour Practice - Voter eligibility in final offer vote limited under circumstances to persons who were employees in bargaining unit at time strike began, except where connection to workplace severed prior to date of vote - Injured employee with no expectation of returning to bargaining unit not eligible to vote - Good faith bargaining obligation not requiring employer to discuss new information with trade union prior to requesting or participating in final offer vote - Board refraining from exercising discretion to grant unlawful strike declaration or direction - Trade union refusal to execute collective agreement constituting under circumstances breach of duty to bargain in good faith - Board directing union to bargain in good faith, submit to vote results, and execute collective agreement reflecting final offer accepted in vote

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *R. M. Sloan* and *D. A. Patterson*.

APPEARANCES: *Fred Bickford* and *Paul LeCuyer* for Gravel and Lake Services Limited; *W. Dubinsky*, *Fred Miron* and *Wilf McIntyre* for the respondents; *Paul Gordon* for the complainants in Board File No. 1213-89-U (participating as interveners in the other matters).

DECISION OF THE BOARD; October 29, 1990

1. The history of this proceeding can be reconstructed from the Board decisions which have previously been issued in the course of the hearings held to date. However, we find it useful to review some of it here as well.

2. On the face of it, these matters are being heard together. On agreement of the parties, however, the Board has first heard the complaint in Board File No. 2034-89-U. Accordingly, it is probably more accurate to say that they are being heard consecutively.

3. Board File No. 2034-89-U bears a filing date of November 15, 1989. It relates to a "last offer", or "final offer" (as it is often called) vote held on November 8, 1989 under section 40 of the *Labour Relations Act*, which vote was requested by the complainant Gravel and Lake Services Limited ("Gravel and Lake"). In it, Gravel and Lake asserts, in essence, that those of its employees in the bargaining unit represented by the respondent trade union voted to accept its last offer and that by failing to sign a collective agreement reflecting that final offer and instead continuing with a strike which had begun on or about April 24, 1989, the respondent trade union and the individual respondents have engaged in unlawful strike activity contrary to the *Labour Relations Act*.

4. Because it was filed as an unlawful strike application, the Board scheduled the matter to

be heard on November 27, 1989 which is significantly more quickly than another kind of unfair labour practice complaint would normally have been scheduled. As reflected in the Board's decision dated November 28, 1989 with respect thereto, none of the complaints were resolved or otherwise disposed of on November 27, 1989. Nor was this panel seized with any of the matters as a result of anything which happened on that day. Because of the nature of the complaints and the limited availability of this panel, the parties were offered the option of proceeding before a differently constituted panel on three days during each of the weeks of December 4, 1989 and January 1, 1990. They declined that option and chose instead to continue before this panel on December 5, 1989 and on February 2, March 2, 8, 16, 28, and 29, 1990 which they had been advised (before electing to proceed before this panel) were the first available hearing dates for this panel. The number of hearing dates scheduled was on the basis of the parties' estimates of how long it would take to conclude the hearing in Board File No. 2034-89-U.

5. At the hearing on December 5, 1989, it quickly became apparent that the seven scheduled hearing days would not be nearly enough. Consequently, in order to facilitate an expeditious hearing, and in consultation with the parties, the Board authorized a Labour Relations Officer to inquire into and report to the Board with respect to the description of the bargaining unit and the list of employees in it for purposes of this proceeding. Even that, however, was not enough to enable the hearing to be completed within the time originally allotted. Eventually, and after some sharp exchanges between the parties which we do not find it appropriate to detail here, additional hearings were scheduled for May 28 and 29, 1990 and the Board concluded hearing the evidence and representations of the parties. Subsequently, by decision dated July 9, 1990, the Board issued its decision with respect to Board File No. 2034-89-U, with written reasons to follow, as follows:

1. The history of these proceedings has been set out in prior decisions of the Board and does not bear repeating here. Having regard to the evidence before the Board and the representations of the parties with respect to Board File No. 2034-89-U, the Board finds:

- (a) that the complainant employer does not operate a business or undertaking which is within federal jurisdiction and that the Board does therefore have jurisdiction in this proceeding;
- (b) that the affected bargaining unit, within the meaning of section 40 of the *Labour Relations Act* and for purposes of the complaint in Board File No. 2034-89-U, is all employees of the complainant who are engaged in woods and marine operations on the limits and on the work sites of the complainant. The Board finds that this includes all employees of the complainant in both its marine and woods operations, and all employees of contractors engaged by the complainant to perform work in its woods and marine operations, save and except the employees of contractors who are engaged to perform occasional special services not commonly performed by employees of the complainant and employees of contractors engaged for the purpose of erecting structures for whom another trade union has bargaining rights;
- (c) that of the persons who cast ballots in the vote conducted under section 40 of the *Labour Relations Act* on November 8, 1989, Robert Casson, Larry Duhaime, Roland Frayne, Raynard Jacobson, Robert Krause, Bruce Nordstrom, Aulus Tiiitto, and Dorothy Westover were employees in the bargaining unit who were entitled to do so;
- (d) that on the basis of the ballots cast by eligible voters, the proposed collective agreement in the offer of the complainant employer which was the subject of the vote conducted under section 40 of the *Labour Relations Act* on November 8, 1989 has been accepted by the majority of the employees in the affected bargaining unit;

- (e) that the actions of the respondents, including their refusal to execute a collective agreement reflecting the proposed collective agreement in the offer of the complainant which was accepted by the bargaining unit employees as aforesaid does not, in all the circumstances, constitute an unlawful strike;
- (f) that, in failing to enter into a collective agreement with the complainant by refusing to execute a collective agreement reflecting the offer of the complainant which was accepted by the bargaining unit employees as aforesaid, the respondent trade union has failed to bargain in good faith and make every reasonable effort to enter into a collective agreement, contrary to section 15 of the *Labour Relations Act*.

2. Accordingly:

- (a) the Board declares that the respondent International Woodworkers of America - Canada, Local 2693 has failed to bargain in good faith and make every reasonable effort to enter into a collective agreement with the complainant;
- (b) the Board directs the respondent International Woodworkers of America - Canada, Local 2693 to submit to the results of the vote held under section 40 of the *Labour Relations Act* on November 8, 1989 as aforesaid;
- (c) the Board directs the respondent International Woodworkers of America - Canada, Local 2693 to forthwith execute a collective agreement which reflects the offer of the complainant which was accepted by the bargaining unit employees in the aforesaid vote.

3. The Board's written reasons for the above will follow.

4. The Registrar is directed to schedule all of the complaints herein for hearing. The purpose of the hearing in Board File No. 2034-89-U is to hear the evidence and representations of the parties on the issue of damages. The purpose of the hearing in the other three matters is to hear the representations of the parties with respect to how they should proceed.

6. Having regard to the circumstances of this case, and particularly the issues involved, the Board found it appropriate, in the exercise of its discretion, to direct the respondents to proceed first. Having proceeded first, the respondents also had the usual right of reply.

7. The hearings before the Board occupied 11 days. In addition to the *viva voce* evidence of the three witnesses who testified before the Board, the parties placed hundreds of pages of documentary evidence before the Board. Pursuant to the Board's authorization, a Labour Relations Officer convened hearings at which the parties had the opportunity to call, examine and cross-examine the witnesses, under oath, with respect to the matters in issue before the Board. The evidence adduced before the Officer was transcribed in his report to the Board, copies of which were provided to the parties. The Officer's examinations took 9 days and yielded 532 pages of transcript and numerous exhibits. There was some confusion in pages 228 to 318 of the transcript of the Officer's Report. This part of the report was redone and subsequently there were no objections to the accuracy of the Officer's Report as amended. As it turned out, much of the evidence which it took so long to put before the Board had little more than, at best, marginal relevance to the issues in Board File No. 2034-89-U. Consequently it was of little assistance to us and it would be a pointless and unnecessary exercise to engage in an exhaustive review of the evidence.

8. There were numerous objections and rulings by the Officer in the course of his inquiry. None of these were pursued before the Board, either pursuant to Board Practice Note #4 or otherwise. We do, however, wish to note one matter which arose before the Labour Relations Officer and of which there was mention before the Board. In the course of the Officer's inquiry, Gravel

and Lake caused Bruce Nordstrom, a complainant in Board File No. 1213-89-U to be called to testify. Counsel for Mr. Nordstrom objected to Mr. Dubinsky continuing to represent any of the respondents on the basis of what he alleged constituted a conflict of interest for Mr. Dubinsky. The Officer noted the objection and proceeded with his inquiry. Subsequently, counsel for Mr. Nordstrom advised the Board that he first became aware of the circumstances which led him to make the objection, just before he made it. He indicated that the basis for his objection was that subsequent to some related civil litigation being commenced, but before the proceedings before the Board herein had been commenced, the respondent trade union had "retained" Mr. Dubinsky (who is not now, and was not at any material time, a lawyer) to assist Mr. Nordstrom with some unemployment insurance matters arising out of his "employment" with Gravel and Lake. Counsel asserted that in the course thereof Mr. Dubinsky became privy to information concerning Mr. Nordstrom which is pertinent to these proceedings and which thereby created a conflict of interest for Mr. Dubinsky, and made it inappropriate for him to continue as the representative of a party adverse in interest to Nordstrom. It was not clear to us how the Board could, other than as authorized by section 23 of the *Statutory Powers Procedure Act*, which no one asserted applied in the circumstances, exclude a person appearing before it as either agent or advisor. Even if the Board could, what would prevent Mr. Dubinsky from passing the information in question on to someone else for use in these proceedings? It did not appear to us that there was any solicitor-client privilege to preclude him from doing so. Nor was it obvious that there was any fiduciary duty which would operate to preclude him from doing so in these circumstances. Counsel for Nordstrom was unable to assist us in that regard and further advised the Board that, other than asking the Board to note the objection, he was not going to press the matter. In the circumstances, the Board concluded that the objection was not in fact being pursued, and it would therefore not make any ruling or take any action with respect to the objection, and would admit the evidence adduced before the Officer in that respect.

9. The Board was also required to make numerous rulings in the course of the proceedings before it. Again, we do not find it either necessary or appropriate to set all of these out. We do, however, wish to note some of the more significant ones. In the course of the second day of hearing, the respondents' challenged, for the first time, the Board's jurisdiction to deal with any voter eligibility questions arising out of the section 40 vote taken on November 8, 1989. For reasons given in its decision dated March 5, 1990 (reported at [1990] OLRB Rep. March 262), the Board dismissed the respondents' objection in that respect.

10. In cross-examination of Paul LeCuyer, principal of the complainant, on March 16, 1990, the respondent sought to elicit evidence of what it asserted was improper conduct with respect to the section 40 vote. Upon objection by the complainant, the Board ruled that it would not allow that line of questioning and that it would not admit such evidence.

11. The respondents asserted that they had first learned of the basis for their assertions in the course of the Officer's inquiry. The respondents relied on the Board's decisions in *McGregor Hosiery Mills*, [1976] OLRB Rep. Oct. 583 and *Western Fair Association*, [1978] OLRB Rep. Jan. 97, and on a passage of page 36 of the textbook *Ontario Labour Relations Board Law and Practice* (Jeffrey Sack, Q.C. and C. Michael Mitchell, 1985, Butterworths, Toronto) in support of their submission that they were, in the circumstances, entitled to cross-examine LeCuyer with respect to what they alleged had been improper conduct. *McGregor Hosiery*, *supra*, and *Western Fair*, *supra*, seem to stand for the proposition that a party which has not provided particulars of what asserts is improper conduct can nevertheless raise an issue, for the first time, in cross-examination. We respectfully decline to follow those decisions.

12. In our view, *McGregor Hosiery*, *supra*, and *Western Fair*, *supra*, are inconsistent with

section 72 of the Board's Rules of Procedure and section 8 of the *Statutory Powers Procedure Act* which require that a party which intends to assert improper conduct provide particulars of its allegations in a timely manner. They are also inconsistent with more recent Board jurisprudence (see, for example, *Trigiani Contracting Ltd.*, [1979] OLRB Rep. Feb. 141 and *Pebra Peterborough Inc.*, [1987] OLRB Rep. March 421), and with the Board's movement toward requiring greater disclosure in both pleadings and the production of documents in the interests of fairness and more expeditious proceedings. What particulars are required will, of course, depend on the circumstances, including the nature of the proceeding, but, in our view, a party which intends to make an allegation of improper conduct is generally obliged to provide particulars thereof whether it intends to pursue the issue through its own witnesses or in cross-examination of witnesses called by another party (or parties).

13. The circumstances of this case demonstrate the merits of the *Trigiani Contracting*, supra, and *Pebra Peterborough*, supra, approach and the problems with *McGregor Hosiery*, supra, and *Western Fair*, supra. In this case, there had been no allegation of any improper conduct with respect to the taking of the vote herein prior to March 16, 1990. The respondents were aware of the allegations which they sought to cross-examine LeCuyer about no later than January 26, 1990 (which was the last day of the hearings conducted by the Officer, and at which time they had not yet closed their case before the Board.) They failed to offer any explanation for failing to make and particularize their allegations prior to March 16, 1990. We were satisfied that the respondents had failed to raise these new allegations in any timely or proper way, and that it would have been unfair and prejudicial to Gravel and Lake, and perhaps to the interveners to permit the respondents to proceed with them. In the result, the line of questioning which the respondents sought to pursue was not relevant to any matter properly placed in issue before the Board and we therefore ruled as aforesaid.

14. The Board also ruled that it would not allow the respondents to ask Wilf McIntyre, one of the individual respondents in Board File No. 2034-89-U and a witness they called in reply, questions with respect to exhibits 25, 26 and 27 which had not arisen out of Gravel and Lake's evidence (the interveners called no evidence before the Board). Not only did such questions amount to the respondents attempting to split their case and were therefore not proper reply in any event, but matters to which the questions related should have been, as a matter of fairness, put to Gravel and Lake's witness (LeCuyer) in cross-examination (see *Brown and Dunn*, (1893) 6 R. 67 (House of Lords); *Peters vs. Perras*, (1909) 42 S.C.R. 244 Supreme Court of Canada; *United Cigar Stores Ltd. and Buller*, (1931) 66 O.L.R. 593, Court of Appeal; *Machado vs. Berlet*, (1986) 57 O.R. (2d) 207; 15 C.P.C. (2d) 207 (High Court of Ontario)).

15. The respondents asserted that Gravel and Lake operates its business within Federal jurisdiction and that the Board is therefore without jurisdiction to entertain the complaints herein. Under the *Constitution Acts, 1867 to 1981*, matters relating to employment law, including labour relations, are *prima facie* within Provincial jurisdiction. Labour relations matters come within Federal jurisdiction only if it is demonstrated that they are an integral part of a Federal work, business or undertaking, or of a "local work of undertaking" excluded from Provincial jurisdiction by section 92(10) of *The British North America Act, 1867* (see, for example, *Toronto Electric Commission vs. Schneider* [1925] D.L.R. 5 (J.C.P.C.); *Northern Electric Company Limited*, 63 CLLC 26 15484; *General Enterprises Ltd.*, [1977] 1 CLRB Rep. 432; *Montcalm Construction Inc.*, (1978) 93 D.L.R. (3d) 641; 79 CLLC 26 14190; [1979] 1 S.C.R. Supreme Court of Canada; *Northern Telecom Ltd. vs. Communications Workers of Canada et al.*, (1979) 98 D.L.R. (3d) 1 Supreme Court of Canada. *Windsor Airline Limousine Services Limited*, [1980] OLRB Rep. Feb. 272 (application for judicial review dismissed (1981) 30 O.R. (2d) 732 (Ont. Div. Ct.); Leave to Appeal denied September 15, 1980 (Court of Appeal)), *W. Rourke Ltd.*, [1983] OLRB Rep. Oct. 1711). Both the

Courts and labour relations tribunals (including this Board) have applied a functional test in determining whether or not the labour relations in issue in a particular case are within Federal jurisdiction; that is, the question to be answered is: does the work in which the employees in question are engaged form an integral part of, or is it necessarily incidental to, a Federal work, undertaking, or business, as a going concern?

16. In that respect, the fact that there is some form of Federal regulation of the employer in question or of its activities may be relevant but will not be determinative. The same is true for activities which the employer is empowered to, but does not, engage in. Rather, it is the activities or work in which the employer and its employees actually engage which will be determinative of a jurisdictional issue (see, for example, *Bachmeier Diamond and Percussion Drillings Co. Ltd. vs. Beaver Lodge District Mine, Mill and Smelter Workers, Local Union 913*, (1962) 35 D.L.R. 241 (Saskatchewan Court of Appeal); *Mid Valley Construction Ltd.*, 74 CLLC ¶16,100, affirmed 74 CLLC ¶14,243, [1974] 6 WWR 575 (Alberta Supreme Court); *Letter Carriers Union of Canada vs. Canadian Union of Postal Workers et al.*, [1975] 1 S.C.R. 178, Supreme Court of Canada; *Montcalm Construction Inc.*, supra; *Northern Telecom Ltd. vs. Communications Workers of Canada et al.*, supra; *Re Henuset Rentals Ltd. and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 488*, 78 CLLC ¶16,137 (Saskatchewan Labour Relations Board), affirmed 96 D.L.R. (3d) 651, 79 CLLC ¶14,194, [1979] 2 WWR 727 (Saskatchewan Queen's Bench), affirmed 119 D.L.R. (3d) 639, [1981] 1 WWR 748 (Saskatchewan Court of Appeal); *Manitou Mechanical Limited*, [1978] OLRB Rep. July 657; *Brotherhood of Railway, Airline and Steamship Clerks, FreightHandlers, Express and Station Employees vs. Canadian Pacific Limited and Marathon Realty Company Limited*, [1978] 1 CLRB Rep. 493; *Timemack Launch Service Ltd. vs. Canadian Brotherhood of Railway, Transport and General Workers, Local 400*, 81 CLLC ¶16,072; *Wakeham and Son Ltd.*, [1981] OLRB Rep. July 1036; *Re Burnshire Mobile Maintenance Ltd. and Canada Labour Relations Board*, (1985) 22 D.L.R. (4th) 748 (Federal Court of Appeal); *National Protective Guard Service Company Limited*, [1987] OLRB Rep. Feb. 245; *Blue Water Bridge Duty Free Shop Inc.*, [1988] OLRB Rep. Feb. 109; *Vibration Assessment Limited*, [1989] OLRB Rep. Feb. 223).

17. The respondent trade union in this proceeding is the successor to the party which applied for and was certified by this Board in June, 1955 as the bargaining agent for all employees of Oscar Styffe Limited at Port Arthur, save and except foreman, persons above the rank of foreman, office and sales staff, and persons regularly employed for not more than 24 hours per week. It is clear, and it was common ground at the hearing, that Gravel and Lake is the successor employer to Oscar Styffe Limited. More contemporaneously, the respondent trade union applied for conciliation, under the *Ontario Labour Relations Act*, with respect to the bargaining between it and Gravel and Lake which immediately preceded this litigation. Other than a passing reference to pages 66 and 67 of the text *Ontario Labour Relations Board Law and Practice*, supra, the respondents offered no authority for the proposition that the labour relations of Gravel and Lake should properly be within Federal jurisdiction. Indeed, they offered the Board so little assistance with respect to this issue in either evidence or argument, that it is difficult to believe that they were really serious about it. In any event, the Board has no cogent evidence before it with respect to activities in which the complainant has been engaged which would support a conclusion that its labour relations are within Federal jurisdiction. Certainly, there is nothing even remotely approaching the extent of the evidence before the Board in *Wakeham and Sons Ltd.*, supra, (a case which dealt with employees of an employer which operated tugs in and out of the port of Hamilton) or in *Vibration Assessment Limited*, supra. There is really nothing before the Board to rebut the presumption that the labour relations of the complainant are within Provincial jurisdiction.

18. The Board therefore determined that the complainant does not operate a business or undertaking within Federal jurisdiction and that the Board therefore has jurisdiction in this proceeding.

19. It was the respondents' position that, for purposes of these proceedings, the bargaining unit included only those employees engaged in Gravel and Lake's marine or tugboat operations (the terms will be used interchangeably herein). Because they did not suggest that any persons engaged in the complainant's woods operations are in any other bargaining unit, they must have been asserting that the respondent trade union holds no bargaining rights with respect to the complainant's woods employees.

20. The most recent collective agreement in effect between the complainant and the respondent trade union expired on August 31, 1987. Articles 3.01 and 10.10 of that agreement provided that:

Article III - Recognition - Jurisdiction

3.01 (a) The Company recognizes the Union as the sole collective bargaining agent for *all of its employees who are engaged in woods and marine operations on the limits, and on the work sites of the Company*. For purposes of this article, Company employees shall be all those employed in the job classifications set out in the wage schedule attached to and form a part of this Agreement, including those who are employed on job classifications which may be established and become part of the attached wage schedule during the term of this Agreement.

3.01 (b) The employees of contractors engaged *in the woods and marine operations on the limits and/or on the work sites* of the Companies shall be considered employees within the terms of this Agreement, save and except the employees of contractors and/or the contractor who are engaged to perform occasional special services not commonly performed by employees covered by the terms of this Agreement, employees of contractors where such contractors are engaged for the purpose of erecting structures and where such a contractor is bound by an Agreement with a Union or Unions affiliated with a central labour body covering such work.

3.01 (c) The Company and the Union agree that an operator who enters in a third party agreement with the Company and the Ministry of Natural Resources, and produces *forest products* for the Company or any of the negotiating companies, shall have an agreement with the Union covering such operations.

Article X - Working Conditions

10.10 The Company agrees that should it at any time during the life of this Agreement, adopt or reinstate any classification not mentioned in this Agreement, which falls under the jurisdiction of the Union the rate for all such will be as per Union Agreement with Abitibi-Price Inc. (Lakehead Division).

[emphasis added]

21. It is a well established rule of interpretation that where the words of a collective agreement are unambiguous, they must be given their ordinary meaning without recourse to extrinsic evidence. In our view, there is no patent ambiguity in the words of this collective agreement. On its face, this collective agreement covers employees engaged in the complainant's woods operations. The reference to employees engaged in woods operations, third party agreements involving the Ministry of Natural Resources, the production of forest products, the respondent trade union's collective agreement with Abitibi-Price (which is, both patently and on the evidence, a woods agreement) all clearly indicate that. That, however, is not the end of the inquiry. It is permissible to refer to extrinsic evidence to discover whether there is any latent ambiguity and, if there is, to use extrinsic evidence as an aid to interpretation (*Leitch Gold Mines Limited et al v. Texas Gulf*

Sulfur Inc. et al., [1969] 1 O.R. 469 (High Ct.); *Noranda Metal Industries Ltd., Ferguson Division and International Brotherhood of Electrical Workers, Local 2345 et al.*, (1984) O.R. (2d) 529 (Court of Appeal); *Re International Union, United Automobile, Aerospace, and Agricultural Implement Workers, Local 1967 and McDonnell Douglas Canada Ltd.*, (1984) 47 O.R. (2d) 78 (Ont. Div. Ct.); *The Brant County Board of Education*, [1984] OLRB Rep. Oct. 1349.)

22. The evidence before the Board revealed no such latent ambiguity.

23. We have already referred (in paragraph 17, above) to a certificate granted by this Board to the Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America with respect to all employees of Oscar Styffe Limited at Port Arthur, save and except foreman, persons above the rank of foreman, office and sales staff, and persons regularly employed for not more than 24 hours per week. It was common ground that Gravel and Lake is a successor employer to Oscar Styffe Limited, that the respondent IWA - Canada, Local 2693, is a successor trade union to the Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, and that at the time the said certificate was issued, the complainant did have a marine operation and some sort of woods operation. There was no suggestion (and there is no evidence) that employees of the complainant engaged in its woods operations were not covered by the certificate. There is some evidence which suggests that the complainant's woods operations were largely curtailed in the 1960's. In any event, there is no evidence that it was carrying on any woods operations at the time of the sale of the complainant to Paul LeCuyer, its present principal.

24. The mere fact that an employer suspends or terminates all or part of its operations does not terminate the bargaining rights held by any trade union with respect to any employees engaged therein (and surely no trade union would suggest that it would). Were the bargaining rights held by the respondent trade union with respect to employees engaged in Gravel and Lake's wood operations terminated in any other way? There is no cogent evidence that they were. In that respect, we found the testimony of Fred Miron, president of the respondent trade union and an individual respondent herein, to the effect that they were, to be disingenuous, to say the least. Indeed, we found that Miron was not a credible witness. He was obviously unable to avoid the influence of self-interest. In cross-examination he was often evasive and unresponsive to the questions asked of him. For example, he claimed to be unable to identify documents, including a copy of the respondent trade union's own bylaws, which he should have had no difficulty identifying. Finally, his testimony was inconsistent with both relevant unchallenged documentary evidence and with what was probable in the circumstances. In the result, we give no weight to his testimony where it is not corroborated by other, reliable evidence.

25. There is no evidence which suggests that the respondent trade union's bargaining rights for woods employees of what is now Gravel and Lake were terminated or abandoned prior to 1985. The evidence reveals that LeCuyer purchased what is now Gravel and Lake in 1985. Prior to purchasing it, LeCuyer, through his solicitor, advised the respondent trade union, and specifically Miron, that he was interested in making the purchase and that if he did so he intended to reactivate Gravel and Lake's woods operation. He indicated he was aware of the then collective agreement between Gravel and Lake and the respondent trade union and requested that the union confirm this to Abitibi-Price Inc. so that Gravel and Lake could obtain a third party agreement to cut on Abitibi-Price timber limits. LeCuyer also indicated that he would like to separate Gravel and Lake's woods and marine operations into separate, independent, departments. In subsequent correspondence, LeCuyer, again through his solicitor, suggested separate bargaining units for the woods and marine operations.

26. In his response, by letter dated June 12, 1985, Miron did not deny that the respondent trade union held bargaining rights with respect to employees of Gravel and Lake engaged in its woods operations. On the contrary, his response suggests that it was the respondent trade union's view that the collective agreement should be "reworded" (something which LeCuyer's solicitor had suggested, in general terms, in his initial correspondence) to address concerns which the trade union had, including, as LeCuyer's solicitor had already suggested, "two separate departments, one for the Tugboat Operators, and one for the Woodlands Operation". That, and the general tenor of Miron's letter, suggests that the respondent trade union believed it had, and intended to enforce, bargaining rights for employees in the complainant's woods operations. Certainly, Miron raised no issue in that respect. We observe also that Miron copied his letter to an F. Adderly of Abitibi-Price. That seems to have been in response to the requests of LeCuyer's solicitor, and also seems to have been accepted by Abitibi-Price, as confirmation of a woods agreement between Gravel and Lake and the respondent trade union because Gravel and Lake was subsequently able to obtain a third party agreement to cut on Abitibi-Price limits.

27. There is no cogent evidence to suggest that the respondent trade union ever took issue with that with either Gravel and Lake or Abitibi-Price (we note that the then (and also the current) collective agreement between the respondent trade union and Abitibi-Price contains a provision identical to Article 3.01 set out in paragraph 20 above requiring anyone entering into a third party agreement to produce forest products for Abitibi-Price or any other negotiating company to have a collective agreement with the respondent trade union).

28. LeCuyer did in fact purchase what is now Gravel and Lake and did reactivate the woods operation. There is no evidence that there were any amendments to the collective agreement or of any further discussions in that respect. The evidence does suggest, however, that the collective agreement was applied by the parties to the complainant's woods operation. It appears that the complainant did not always comply with the strict terms of the collective agreement and that the respondent trade union did not seek to strictly enforce it. However, we find that what *did* happen was of greater significance than what did not.

29. In or about May, 1987, the respondent trade union delivered a "seniority" grievance on behalf of Brian Luoma. Although the evidence on the point is sketchy, it suggests that Luoma was primarily employed in the complainant's woods operation. It appears that the grievance was based on the seniority he accumulated in both the marine and woods operation being carried on by Gravel and Lake at the time.

30. Even more revealing is a grievance filed by the respondent trade union on or about August 10, 1987 with respect to Gerry Blomquist which was the subject of an arbitration award dated October 30, 1987. There, the respondent trade union grieved that Blomquist should have been allowed to "bump" a less senior employee rather than be laid off. The arbitrator found that Gravel and Lake was engaged in operations other than marine operations and that the collective agreement covered these other activities. Blomquist was found by the arbitrator to have been an employee of the complainant primarily engaged in other than its marine operations; namely, in hauling wood. On the face of the arbitrator's award, it was the union's position before him that the bargaining unit included Gravel and Lake employees engaged in its woods operations and that woods employees were entitled to resort to seniority accumulated in the woods operation for the purpose of exercising bumping rights with respect to positions in the complainant's marine operations. The arbitrator agreed with the trade union and allowed the grievance.

31. The arbitration award in the Blomquist grievance, and the exhibits thereto are also revealing for other reasons. In the proceeding before the Board, the respondent trade union, and

particularly Miron, denied that it had received any of the seniority lists which Gravel and Lake asserted had been sent to the trade union in accordance with the collective agreement. That position is not consistent with the documentary evidence. In the Blomquist grievance, the arbitrator found that "the union provided uncontradicted evidence that the grievor possessed more seniority than the individual who was operating the tugboat...". Although the arbitrator does not specify what that evidence was, among the exhibits in the arbitration proceeding are two summaries of dues deductions/remittances and two seniority lists. There is nothing to indicate who filed the seniority lists. However, it is obvious that the respondent trade union had at least those two by the time of the grievance arbitration in 1987. Further, both have the date they were received stamped on them. Very few of the documents entered into evidence before the Board in this proceeding were both received by the trade union in the course of its dealings with Gravel and Lake and filed by the respondent trade union. However, two of them, exhibits 3 and 6, were. Both have on them the same kind of date stamp as appears on the seniority lists filed before the arbitrator in the Blomquist arbitration. On the other hand, the date stamp used by Gravel and Lake at the time, as it appears on other documents before the Board, was quite different. Consequently, we conclude that the respondent trade union received the seniority lists filed in the Blomquist grievance arbitration proceeding in the ordinary course of business. Further, although Miron claimed to be unable to identify the numerous dues deductions/remittances documents which LeCuyer testified had been sent to the respondent trade union, the trade union's own correspondence with Gravel and Lake with respect to dues remittances confirms that these, which include the two which were made exhibits in the Blomquist arbitration proceeding, were received by the respondent trade union in the ordinary course of business. Having regard to all of the evidence, we are also satisfied that LeCuyer did send the various Gravel and Lake seniority lists to the respondent trade union as he testified he did and that the trade union did receive them.

32. We note that there was a suggestion that the monies received by the respondent trade union in that respect were some sort of "working dues" rather than monies payable as union dues under the collective agreement. However, although the trade union's own correspondence sometimes refers to the monies it received from Gravel and Lake in that respect as "working dues", it was generally simply referred to as "union dues remittance". Further, we are unable to understand how the trade union could be entitled to any such dues, which it kept and acknowledged receipt of, except pursuant to the terms of a collective agreement. We are unaware of any other basis upon which it could require Gravel and Lake, or any other employer, to deduct what would amount to a working permit or license fee from its employees.

33. We do wish to note that Gravel and Lake's seniority lists and dues remittance documentation is not accurate in its detail (and we will have more to say about this below). However, in our view, it does accurately portray the general extent and nature of the company's operations.

34. The number of employees of Gravel and Lake for which it made union dues remittances increased from a low of 5 in December 1985 to a high of 33 in August 1986. Between September 1986 and April 1989 when the strike began, Gravel and Lake remitted monthly union dues with respect to an average of some 18 employees. In none of those 32 months did it remit for fewer than 9 individuals and for only 7 of them did it remit for fewer than 15. In addition to the other seniority lists which we are satisfied the respondent trade union received between 1986 and 1988, each remittance was accompanied by a list of the persons with respect to whom the remittance was being made. Having regard to the nature of Gravel and Lake's marine operation and the presence of a union steward on the tugs, we find it inconceivable that the respondent trade union could reasonably have believed that all of these individuals were employed in Gravel and Lake's marine operations. The two grievances referred to above, and particularly the Blomquist grievance, con-

firm that it did not believe that, and further that it was well aware that Gravel and Lake had a woods operation.

35. Finally, the respondent, having given the complainant notice, by letter dated June 15, 1987, that it wished to bargain a new collective agreement, applied for conciliation. In its application, dated January 20, 1989, it identified the nature of the complainant's business as "industrial operations" and the nature of the bargaining unit as "all employees engaged on the work sites of the company". This too suggests that the respondent was aware that the complainant had other than marine operations and that it did not (then) take the position that employees in other than the marine operation were not included in the bargaining unit it represented.

36. The respondent trade union's own actions belie its assertion that the bargaining unit in this case is limited to employees of Gravel and Lake engaged in its marine or tugboat operation. There is simply no cogent evidence which suggests that there is any latent ambiguity in the words of the most recently expired collective agreement. On the contrary, the evidence confirms that the respondent trade union's bargaining rights for Gravel and Lake's woods employees have never been abandoned or otherwise terminated, and that the words of the collective agreement, as set out in paragraph 20 above, accurately describe the bargaining unit as consisting of employees in both the marine and woods operations carried on by the complainant, which employees include Gravel and Lake's own direct employees and employees of contractors engaged by Gravel and Lake in those operations. Accordingly, the Board found (in paragraph 1(b) of its July 9, 1990 decision - see paragraph 5, above) that the affected bargaining unit, within the meaning of section 40 of the *Labour Relations Act* and for purposes of the complaint in Board File No. 2034-89-U, is all employees of the complainant who are engaged in woods and marine operations on the limits and on the work sites of the complainant, including all employees of the complainant in both its marine and woods operations, and all employees of contractors engaged by the complainant to perform work in its woods and marine operations, save and except the employees of contractors who are engaged to perform occasional special services not commonly performed by employees of the complainant and employees of contractors engaged for the purpose of erecting structures for whom another trade union has bargaining rights.

37. Having determined the description of the "affected bargaining unit" within the meaning of section 40, the Board then considered which individuals were employees in it for purposes of the vote which was held on November 8, 1989. A total of 94 ballots were cast and counted. Of these, 77 were cast by persons collectively referred to throughout the proceedings as the "Abitibi employees". As this appellation suggests, it was common ground that these 77 persons were, at all material times, employees of Abitibi-Price Inc.. The respondents maintained their position that these persons were directly affected and that they were therefore entitled to vote in the vote held on November 8, 1989 until final argument. The respondents never did make any argument to that effect. Indeed, they specifically indicated (in final argument) they were not pursuing the point. In any event, there is not a scintilla of evidence before the Board which suggest that there is any employment connection between the 77 Abitibi employees and Gravel and Lake. It is absolutely clear that they were not "employees in the affected bargaining unit" within the meaning of section 40 of the Act.

38. Of the remaining 17 persons who cast ballots, the right to vote of only 2, Larry Duhaime and Roland Frayne, was originally unchallenged. Through the course of the proceeding, it was eventually agreed that Robert Casson was also entitled to vote, and that Rejean LaFreniere, Manuel Alves, David Jaggard, Prosper Brizzard, and Richard Brizzard were not entitled to vote. This left in dispute the right to vote of 10 persons who had cast ballots. Of these 9 (that is, all but

Don McLean) were challenged by the respondents. Gravel and Lake challenged McLean's right to vote.

39. In their argument, the respondents submitted that to be entitled to vote, the persons in dispute had to demonstrate a connection with the workplace and had to be "employees" rather than independent contractors. They urged the Board to apply the principles enunciated in *Atway Transport Inc.*, [1989] OLRB Rep. June 540 and *Algonquin Tavern*, [1981] OLRB Rep. Aug. 1057 with respect to the latter question. The respondents submitted that some of the documentary evidence put before the Board by Gravel and Lake had been contrived and that, taken as a whole, Gravel and Lake's documentary evidence was generally unreliable. The respondents also made much of the fact that Gravel and Lake had caused the names of quite a few more persons to be placed on the voters' list than it eventually argued were entitled to vote and of evidence that Gravel and Lake had failed to apply the terms of the collective agreement to the persons in dispute which it now alleged were entitled to vote.

40. The Board has not previously considered how voter eligibility in section 40 votes should be determined. Section 40 itself stipulates that a vote conducted under it will be of employees in the affected bargaining unit. The rule usually applied by the Board to determine voter eligibility is that all persons employed in the voting constituency (in this case, in the bargaining unit) on the date to vote is ordered (or on the terminal date, in the case of a pre-hearing representation vote), are eligible to vote. If no strike or lock-out is ongoing at the time that a section 40 vote is requested, directed and conducted, it seems likely that that rule would be equally useful in resolving any voter eligibility questions which might arise. However, we are not satisfied that the rule is equally applicable where, as in this case, there is an ongoing strike or lock-out. In a strike or lock-out situation there may be no employees at work when such a vote is requested, directed or conducted and there may therefore be no employees *at work* in the bargaining unit. Or, because an employer is entitled to try to carry on its business during a strike or lock-out (and because strikes sometimes receive less than complete support from employees), issues may arise as to whether persons who work during a strike or lock-out are entitled to work, particularly if they are "replacement workers" in the sense that they were not employed prior to the strike or lock-out. Although voter eligibility was not an issue there, the Board touched on this potential problem in *Canada Cement Lafarge Ltd.*, [1980] OLRB Rep. Nov. 1583 ("*Canada Cement I*") at paragraph 9:

9. A similar but much more difficult situation may arise where the outcome of the vote has been clearly influenced by the segregated ballots cast by a large number of strike replacement employees. If the vast majority of the employees in the bargaining unit who are employed at the commencement of the strike have, however, voted to reject the last offer and to continue their strike, it would be counter-intuitive, in an industrial relations sense, to conclude that the trade union is automatically bound by the wishes of employees it does not really represent. Indeed, the employer's offer in such circumstances might even contain terms which are very damaging to the trade union as an entity, i.e. See *Wilson Automotive (Belleville) Ltd.*, [1980] OLRB Rep. July 1136 where an employer's offer contained a demand that the trade union compensate it for losses sustained during a strike. Whether the trade union is obligated to submit to the balloting in these kinds of situations may well depend on the duration of the strike at the time of the vote and other important industrial relations facts. Quite different approaches may also be needed where the employer and trade union have agreed at the outset of negotiations to multi-plant negotiations or other format conditions of bargaining. All of the above, therefore, are useful examples by which to illustrate that a collective agreement need not automatically follow an affirmative vote in a bargaining unit to accept an offer and that section [40] must be applied in light of accepted principles of collective bargaining. As will be elaborated below, the section is intended to end industrial conflict and cannot be used as a vehicle to achieve some destructive aim wholly inconsistent with the overriding purposes of the statute.

41. The potentially thorny issue of replacement workers did not arise in this case. Having

regard to the evidence before the Board, and the manner in which the parties approached the issue of voter eligibility, we determined that it was appropriate to limit the eligibility to vote to persons who were employees in the bargaining unit at the time the strike began. In our view, it was appropriate that such persons should have the right to vote, whether or not they continued to actually work for Gravel and Lake after the strike began, unless it was established that they had severed their connection with the workplace prior to the date on which the vote was conducted.

42. In applying this test, we found that Gravel and Lake's *viva voce* evidence did little to assist us in determining if the persons in dispute were entitled to vote. LeCuyer's testimony in that respect was, we found, generally rather vague or symptomatic of an inability to avoid the influence of self-interest. Similarly, whatever value Gravel and Lake's documents may have to it in the operation of its business, we concluded that those such documents which were placed into evidence before the Board were not a reliable indicator of who was or was not an employee in the bargaining unit for purposes of this proceeding. We are not prepared to find that the documents were contrived or fabricated as suggested by the respondents. However, LeCuyer's own testimony, and the testimony of the individuals whose employee status is in dispute, reveals that they are inaccurate or incomplete in a sufficient number of instances to cause us to doubt their reliability. For example, Gravel and Lake's documents are sadly lacking in information with respect to the employees of contractors engaged by it in its woods operation (which employees were, we have found, employees in the bargaining unit for purposes of this proceeding). Gravel and Lake did not always keep track of when individuals were "hired" or "left", the payroll documents fail to accurately reflect either the hours that the persons to whom they relate actually work, the manner in which they were paid and, in some cases, the days they worked. The documents do not reveal all of the persons who were employees (for example, the persons engaged by Darrell Westover in the fall of 1989), LeCuyer admitted to inaccuracies in the dues remittances with respect to Nordstrom, Jacobson and Dorothy Westover, and in the seniority lists both in terms of who is shown to be on them and the number of days of seniority. These examples are not exhaustive but do serve to illustrate why we found the documents to be unreliable as evidence of which persons were employees in the bargaining unit for the purposes of this proceeding.

43. We did not understand why it should be significant that Gravel and Lake did not argue that as many persons were entitled to vote as it originally had placed on the voters' list. The respondents' argument in that respect ignores that what was important in this case was the eligibility to vote of those persons who actually cast ballots. It was on that basis that the matter was litigated. The question of which persons who did not cast ballots were eligible to do so was not relevant to any issue before the Board in this proceeding and the respondents' position in that respect was very much a red herring.

44. With respect to the respondents' assertion that the manner in which Gravel and Lake applied the collective agreement indicates which persons were and were not employees, we find it sufficient to reiterate our view that what did happen in that respect is more significant than what did not.

45. The evidence before the Board reveals that Don McLean has not worked since June 17, 1988 when he was injured in the course of his employment with Gravel and Lake. He is receiving a permanent disability pension from the Workers' Compensation Board. There was no indication that he will ever return to work for Gravel and Lake. On the contrary, the evidence indicates that there is no expectation that he will ever return to work for Gravel and Lake and that he has been looking for other employment which offers work which he can perform notwithstanding his disability. Accordingly, we were satisfied that McLean had no real connection with the workplace either

at the time the strike began or on the day the vote was conducted and was therefor not an employee in the bargaining unit for purposes of the vote held under section 40 herein.

46. For the other 9 individuals, the real question was whether they were "employees" or independent contractors. Section 1(1)(i) of the Act defines "employee" as including dependent contractors. Pursuant to section 1(1)(h), the term "dependent contractor":

- (h) "dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

In *Airline Limousine*, [1988] OLRB Rep. March 225, the Board reviewed the development and application of that term. As that decision illustrates, it can be quite difficult to distinguish between "dependent" and "independent" contractors. More recently the Board reviewed its approach to making that distinction in *Atway Transport Inc.*, *supra*.

47. Manfred Krause began an association with Gravel and Lake during the summer of 1986. With the exception of a few months in the fall of 1988 when he was employed by Gravel and Lake as a deck hand on one of its tugs, he was engaged exclusively in Gravel and Lake's woods operation. Manfred Krause had typical employment deductions made from what he earned as a result of being engaged in Gravel and Lake's woods operation. This, and some scarifying work he did using a Gravel and Lake machine suggests that he was an employee. He did deduct the expenses associated with running his skidder in Gravel and Lake's woods operation for income tax purposes but without more evidence on the point, we cannot say whether these are more like employment or business expenses. Consequently, that is a neutral factor. On the other hand, although Manfred Krause did not work, or even seek work, elsewhere, he was free to do so while engaged by Gravel and Lake. Also, although he is directed to the work which needs to be done, it is up to him whether or not he does it and, once he chooses to, when and how he does it is within his discretion to determine. Finally, although he received bi-weekly advances, he was paid on a piece work basis at a rate he negotiated with Gravel and Lake and which included some consideration for the use of his skidder. In that respect, Manfred Krause also testified that he could have "rented" a Gravel and Lake skidder if he'd wished. We found Manfred Krause's case to be close to the line but, on balance, we were satisfied that Manfred Krause more closely resembles an independent contractor than an employee.

48. Darrell Westover has been engaged in Gravel and Lake's woods operation since 1985 or 1986. In April, 1989, he was engaged operating his own skidder. He had purchased that machine in 1988. Prior to that he had operated a Gravel and Lake skidder and had worked as a deck hand on a Gravel and Lake tug on an occasional basis. What was significant for purposes of this proceeding, however, was what he did in 1989. Gravel and Lake was Darrell Westover's sole source of income in 1989. However, he was paid on a piece work basis at a rate which included payment by Gravel and Lake for the use of his skidder. He was responsible for and paid for all the maintenance and upkeep of his machine. None of the usual employment deductions were made from the payments he received from Gravel and Lake. He has his own employer's Workers' Compensation Board number for employer remittance purposes. In 1989, he did some road work relating to Gravel and Lake's operations. He neither received nor expected any payment for this. According to his testimony, he did it for Gravel and Lake and for himself, which we take to be an indication that he was attempting to enhance his "chance of profit" or reduce his "risk of loss". Finally, he hired and directly paid another individual (Gord Wilson) without any consultation with or input from Gravel

and Lake to assist him in work he was performing for Gravel and Lake. On the evidence before the Board, we were satisfied that Darrell Westover was an independent contractor rather than an employee.

49. Larry Jaggard has had an association with Gravel and Lake for a number of years. Although he sometimes was paid at an hourly rate from which the usual employment deductions were made, he was usually paid on a piece work basis by Gravel and Lake without having the usual employment deductions made. Larry Jaggard has contracted his services to companies other than Gravel and Lake and hired Raynard Jacobson to work for him in the past. He has carried on business under the name "Larry Jaggard Trucking" and, since October 1989, under the firm name and style of "Tamaradeb Timber Inc.". We were satisfied that Larry Jaggard was more like an independent contractor than an employee.

50. Robert Krause was hired by Gravel and Lake on December 3, 1988. He was paid an hourly wage and had the usual employment deductions made from his wages. He owns a skidder. When he uses it while working for Gravel and Lake he is paid a fee, by separate cheque, for it. At other times he operates Gravel and Lake machines. He is directed when as well as where to work by Gravel and Lake. From time to time, he has worked on Gravel and Lake's tugs. Like his father Manfred, we found Robert Krause to be close to the line. On balance, however, we were satisfied that the nexus between him and Gravel and Lake was more like an employment relationship than not. Accordingly, we found Robert Krause to be an employee and further that he was an employee in the bargaining unit for purposes of the section 40 vote herein.

51. At the time he testified before the Labour Relations Officer, Aulius Tiitto was self-employed and was working in partnership with his brother on a district cutting license which has nothing to do with Gravel and Lake. From January 1989 until the strike began, however, he worked for Gravel and Lake. He was paid at an hourly rate and was told what to do, and when and where to do it by Gravel and Lake. He used Gravel and Lake equipment both on the job and to get to and from the job site. The usual employment deductions were made from his wages. In our view, Aulius Tiitto was quite clearly an employee of Gravel and Lake. Although he is currently self-employed, his partnership with his brother existed while he was an employee of Gravel and Lake. He testified that he has not decided to not return to Gravel and Lake at the conclusion of the strike and there was no suggestion in the evidence that the employment relationship between him and Gravel and Lake has been severed such that it would be inappropriate to find him eligible to vote. In the result, we were satisfied that Aulius Tiitto was an employee in the bargaining unit for purposes of the section 40 vote herein.

52. On the evidence before the Board, Raynard Jacobson, Bruce Nordstrom and Dorothy Westover were clearly employees of David Jaggard, who carries on business under the firm name and style of "Towanda Timber Limited", in March and April, 1989, until the strike began. They were paid on either a piece work or hourly basis (depending on what they were doing) had the usual employment deductions taken from their wages, and used Towanda Timber Limited's equipment. In addition, Towanda Timber made remittances under the Workers' Compensation Act with respect to them. They were all employed by Towanda Timber with respect to work being performed for Gravel and Lake. In our view, what occurred since the strike began on April 24, 1989 was insufficient to affect their status as employees in the bargaining unit for purposes of the section 40 vote. We were satisfied that Raynard Jacobson, Bruce Nordstrom, and Dorothy Westover were all employees of a contractor of Gravel and Lake and were, as such, employees in the bargaining unit herein (see paragraphs 5 and 36, above). Consequently, they were all entitled to vote.

53. Having determined the bargaining unit and the eligibility to vote of those persons who cast ballots, the Board then turned to determine the effect, if any, of the section 40 vote.

54. A total of 94 ballots were cast (see paragraphs 37 and 38, above). Of these, 77 were cast by Abitibi employees who were not eligible to do so. Of the 17 other ballots, 2 were cast by Duhaime and Frayne against accepting Gravel and Lake's last offer, whose eligibility to vote was never in dispute. Of the remaining 15 ballots, all cast by persons whose eligibility to vote was in dispute, 14 were cast in favour of accepting the last offer. Since none of these latter 15 ballots were segregated, it was not possible to precisely determine the result of the vote. However, it was possible to determine that a maximum of three ballots (including those cast by Duhaime and Frayne) had been marked for rejection of Gravel and Lake's final offer, leaving a minimum of five ballots marked in favour of accepting it. Accordingly, the employees in the affected bargaining unit had voted to accept Gravel and Lake's last offer.

55. What is the effect of this result? As we observed in our March 5, 1990 decision herein (reported [1990] OLRB Rep. March 262), section 40 does not prescribe the consequences of a vote under it. More specifically, it does not prescribe the result of a vote under section 40 in which the majority of the ballots cast are marked in favour of accepting "the offer of the employer last received by the trade union...". In determining what result should flow from a last offer vote, it is important to remember that section 40 provides for an exception to the rule that an employer cannot bargain directly with employees in a bargaining unit but must bargain only with a trade union which is their exclusive bargaining agent. As the Board concluded in *Canada Cement I* and *Canada Cement Lafarge Limited*, [1981] OLRB Rep. Dec. 1722 ("*Canada Cement II*"), section 40 provides an extraordinary process which has been injected into the normal collective bargaining process. Because the legislation does not stipulate the consequences of a vote conducted under it, it is consistent with what we perceive to be the legislative intent (namely; to reduce the potential for industrial conflict by introducing a safety valve for the tension which often accompanies traditional collective bargaining - see *Wilson Automotive (Belleville) Ltd.*, [1980] OLRB Rep. Sept. 1337 and *Canada Cement I* at paragraphs 8-14) to consider sections 15 and 89 to be the appropriate vehicles for the enforcement of section 40. Accordingly, and for the reasons canvassed in *Canada Cement I* and *II*, the effect of a section 40 vote will depend on the circumstances, which circumstances it is appropriate to examine in the context of the obligation, of both employer and trade union, to bargain in good faith and to make every reasonable effort to make a collective agreement.

56. The complaint in Board File No. 2034-89-U was styled by Gravel and Lake as an application for a declaration that the strike activity being engaged in by the respondents was unlawful. The essence of the pleading by Gravel and Lake is that the employees in the bargaining unit affected by Gravel and Lake's final offer had voted to accept it, and that by refusing to sign a collective agreement reflecting that final offer and continuing with the strike activity they had begun on or about April 24, 1989, the respondents were engaged in an unlawful strike activity contrary to the *Labour Relations Act*. In order to arrive at the conclusion pleaded by Gravel and Lake, however, it would, having regard to the Board's analysis of section 40 in *Canada Cement I* and *II* (with which we agree and of which the parties were or ought to have been aware), first be necessary to find that the respondents, and specifically the respondent trade union, had breached their obligation, under section 15 of the Act, to bargain in good faith, by refusing to execute a collective agreement reflecting the "last offer" voted on. But for the coming into effect of a collective agreement, the strike activity being engaged in by the respondents could not be unlawful. Further, we were satisfied that the matter was litigated by all parties as though it had been specifically pleaded as a "failure to bargain in good faith" complaint. At paragraphs 27 and 28 of *Canada Cement II*, the Board completed the analysis of section 40 it had begun in *Canada Cement I* as follows:

27. ...section 40 provides no explicit guidance as to how the unequivocal results of such balloting are to be enforced. This latter silence was the focus of the Board's earlier decision wherein it declined to hold that a section 40 vote had no binding effect or that the statute contained no enforcement mechanism. In order to make sense of and give practical effect to the new provision, the Board decided sections 15 and 89 were convenient vehicles for the enforcement of section 40 and consistent with legislative intent. This decision was recently upheld by the Supreme Court of Ontario in a unanimous decision [reported at 82 CLLC 26 14,152, (Ont. Div. Ct.)]. This initial decision having been made, would it be equally sensible and practical to assess damages against a party who has, in good faith and on reasonable grounds, unsuccessfully contested the results of a section 40 vote on one of the foreseeable bases set out in the Board's earlier decision? We think not. When considering the silence of section 40 on the question of enforcement, we thought it inconceivable that the Legislature wished the intervention of balloting without intending that a vote in favour of accepting the employer's last offer be binding. We think it equally inconceivable that the Legislature would have intended substantial compensatory awards to be issued in response to disputes over the usual kind of issues that can arise from balloting procedures. For example, the final results of balloting could hang on the Board's disposition of an employer's objection to the entitlement of certain persons to vote. In the context of strikes, allegations that employees working elsewhere during the strike have severed their employment are not unusual. See *Brooker Trade Bindery Ltd.*, [1973] OLRB Rep. Dec. 612. If the employer was successful before the Board and the Board therefore concluded that the trade union was obligated to submit to the results of the vote, would the added remedy of substantial compensation capture the Legislature's intention in enacting section 40? To ask the question is to answer it in our view. The purpose of section 40 is to end a collective bargaining impasse where this is in accord with the wishes of the majority of the bargaining unit. Where a party in good faith and on reasonable grounds challenges the result of a vote as an accurate representation of the majority's wishes, we do not see how the purpose of section 40 would be served by causing compensation to run before those challenges have been dealt with and the majority's wishes authoritatively identified. Indeed, awarding compensation in the face of proper objections would more likely inflame relations between the parties and create unwarranted and distracting employee anxiety over last offer balloting. Employees should know that such balloting will be carried out fairly and correctly before any issue of compensatory relief for non-compliance arises and this employee state of mind is also in the interest of employers who elect to make use of the section.

28. We point out that the two sections, sections 15 and 40, are functionally inter-related and the precise effect of section 40 may have to await the Board's intervention where challenges arise out of the balloting. This is to be contrasted with the typical section 15 situation where the respondent trade union or employer must only contend with its obligations under section 15 and harmonize its bargaining objectives and tactics with the requirements of that sole provision. The position of a trade union objecting in good faith and reasonably to the validity of a section 40 vote is more closely like that of an employer who contests the validity of a representation vote conducted under section 7 of the statute. Fortunately, in representation matters there is no immediate obligation to recognize the trade union following the vote. Instead, the Board first entertains the employer's objections and then, if dismissed, a certificate issues which then triggers the bargaining duty. However, we see no reason why a similar approach cannot be fashioned in respect of good faith and reasonable objections to section 40 votes by exercising our discretion under section 89 not to award compensation until after the Board's decision dealing with the objections. We also see no reason why the Board could not expedite such hearings in order to facilitate industrial peace and minimize any potential economic loss. Last offer vote balloting may raise very significant challenges to voting entitlement; the conduct of the parties; or pertain to the very degree of voter support necessary to trigger a binding result. In discussing these possible complexities, the Board stated in its earlier decision "that section 14 (now section 15) must be applied in light of accepted principles of collective bargaining". We know of no other section of the Act that is so closely intertwined with section 15 while at the same time potentially requiring the Board's intervention to dispose of very proper objections that may arise out of the actual administration of the section. Clearly, the situation in this case is distinguishable from those found in *Grey-Owen Sound Health Unit*, *De Vilbis* and *Fotomat*, and relied on by *CCL, supra*. We also point out that the employees were engaged in a lawful strike with all the "emotional baggage" that conflict of this kind entails. It seems to this Board unrealistic to require a trade union, having raised a proper objection to the vote's result, to end an otherwise lawful strike for the period of time required to process the objection before the Board. It is our

view that the Legislature intended this intervention into collective bargaining to be accomplished with as little disruption as possible and this is the spirit of the Board's approach herein. It is, therefore, the Board's view that *while a refusal to accept the results of a section 40 vote immediately triggers the bargaining duty, refusals made in good faith and on reasonable grounds will not be met by the automatic imposition of monetary orders under section 89* running from the date of the vote if and when the underlying objections are dismissed. Following the dismissal and the Board's decision, the full remedial force of section 89 will respond to continued refusals. We wish to stress that *objections must have a reasonable basis to them to activate the Board's discretion.* Only by so requiring can we balance the competing interests of employers and trade unions in these matters.

[emphasis added]

57. As the Board said in *Canada Cement II*, the purpose of section 40 is to provide an opportunity to end the collective bargaining impasse where the offer last made by the employer to the trade union is acceptable to the majority of employees in the bargaining unit. It is open to either party to challenge, on reasonable grounds, the results of such a vote. And, having made such a challenge, it would be unrealistic to expect an employer or trade union to end an otherwise lawful lock-out or strike, as the case may be.

58. If we discount the respondents' frivolous suggestion that the 77 Abitibi employees were entitled to vote, the apparent result of the vote was 14 in favour of and 3 against accepting Gravel and Lake's final offer. The respondent challenged the right to vote of 14 of those employees. It eventually withdrew one of those challenges, and was successful in 8 others (5 challenges having been agreed to by the other parties, and 3 having been sustained by the Board). On its face, this may tend to suggest that the respondents had reasonable grounds for their challenges, and therefore reasonable grounds for refusing to accept the apparent results of the vote. However, closer scrutiny yields a different result.

59. The respondents' primary position throughout the proceeding was that the respondent trade union did not represent in bargaining those employees of Gravel and Lake engaged in Gravel and Lake's woods operation. Only in the alternative, did they argue that anyone engaged in Gravel and Lake's woods operation was not an employee in affected bargaining unit in any event. We are satisfied, on the basis of the evidence before the Board, that the respondent trade union would not have signed a collective agreement reflecting the offer voted on even if there had been no dispute regarding the employee status of the persons who cast ballots. Ostensibly, this refusal would have been based, as in fact it was, on an assertion that it represented only employees in Gravel and Lake's marine operation, both of which employees had voted against accepting Gravel and Lake's final offer. On the evidence before the Board, there is no objective merit whatsoever in that assertion. That, together with a frivolous assertion that the 77 Abitibi employees were entitled to vote (which assertion was not withdrawn until very late in the day), and the evidence before the Board with respect to the approach taken by the respondent trade union to collective bargaining with Gravel and Lake, suggests that it had no intention of entering into any collective agreement with the complainant, whatever the outcome of the vote, unless it obtained a volume restriction in its separate collective agreement to cover the woods employees.

60. In *Canada Cement I*, the Board stated that:

23. It is also important to stress that the employer has an ongoing duty under section [15] regardless of section [40]. The decision to place a last offer before bargaining unit employees under section [40] arises because trade union representatives have refused to do so. Their refusal to do so will have likely been based, in part, on the circumstances then existing and the employer's rationale in making the offer. Where the rationale of the employer has undergone a fundamental change because of significant and related changes in circumstances since the offer was made to the trade union, an employer may be obligated under section [15] to place such

new information and reasoning before the trade union prior either to requesting or, at least, prior to participating in a last offer vote under section [40]. Section [40] should be limited to those situations where the trade union has refused to place a last offer before the membership after having been acquainted with all of the significant reasons for its acceptance known by the employer. Where important changes in these reasons have occurred, the trade union may be willing to review its position making a section [40] vote unnecessary. Candor in this respect will also minimize suspicion over the *bona fides* of the employer where these significant new reasons are laid before the employees should the union continue in its refusal to submit the offer to the employees for their consideration.

The respondents argued that, in this case, Gravel and Lake had failed to properly present and discuss the offer with respect to which it requested the section 40 vote herein to the respondent trade union.

61. Certainly, the parties were under an ongoing obligation under section 15 to bargain in good faith and make every reasonable effort to make a collective agreement. But given the extraordinary nature of section 40 we do not view that obligation as extending so far as to require an employer requesting such a vote to discuss any new information or reasoning it might have with the trade union prior to requesting or participating in a vote under section 40 in every case. What an employer is required to do in that respect will depend on the circumstances. In this case, we are satisfied that it would have been completely pointless for Gravel and Lake to have attempted any such discussion. The respondent trade union had made it abundantly clear that it would not bargain further unless Gravel and Lake acceded to its demand that there be a separate collective agreement for Gravel and Lake's woods employees which contained a restriction on the volume of wood which Gravel and Lake could cut. All indications are that it was not prepared to negotiate the matter further. Nor was there anything new to discuss.

62. Further, the evidence also reveals that, by letter dated October 3, 1989, Gravel and Lake did send the "last offer" which was voted on to the respondent trade union, to the attention of the respondent Miron. In the same letter, Gravel and Lake warned that if the offer was not accepted, it would apply for a section 40 vote which it subsequently did. At no time after it received that letter from Gravel and Lake, did the respondent trade union seek to engage in any discussion with respect to the offer contained in it.

63. We are therefore satisfied, that there is no merit to the respondents' submission that Gravel and Lake failed to comply with any formal requirements of section 40.

64. In the result, we were satisfied that the respondents and specifically the respondent trade union had no intention of entering into a collective agreement with Gravel and Lake which did not meet its demands with respect to the company's woods operation regardless of the outcome of a vote conducted under section 40. We were also satisfied that the respondent trade union had failed to offer any reasonable excuse for its failure to execute a collective agreement reflecting the last offer which was the subject of the section 40 vote herein. Finally, we were satisfied that, in the circumstances, this refusal constituted a breach of section 15 of the *Labour Relations Act* by the respondent trade union. Because the section 15 obligation to bargaining in good faith is an obligation of the parties; that is, the employer and the trade union, the individual respondents could not be in breach of it.

65. Having found a breach of section 15 as aforesaid, the Board considered it appropriate to direct the respondent trade union to submit to the results of the section 40 vote and to execute a collective agreement reflecting the offer of Gravel and Lake which was the subject of that vote. We note that the respondents did not suggest that there was any doubt with respect to the terms and conditions of such a collective agreement. Consequently, all that was left was the respondent

trade union refusing to formally execute it (see *Canada Cement I* and *II*; and see also *Treco Machine and Tool Limited*, [1982] OLRB Rep. Dec. 1954; *Fotomat Canada Limited*, [1981] OLRB Rep. Feb. 145; *Wilson Automotive (Belleville)*, *supra*).

66. Did the respondent trade union's breach of section 15 and the individual respondents' role therein make the strike activity they were involved in unlawful? We did not think so. The *Labour Relations Act* recognizes the limited right to strike. There is no right to strike during the term of a collective agreement or before the conciliation process is exhausted (section 72). It is possible that a breach of the *Labour Relations Act* will make an otherwise lawful strike (or lock-out) unlawful. Whether and when a breach of the Act will produce such a result will depend on the circumstances of the situation taken as a whole. It is conceivable that there are circumstances in which a breach of section 15 of the Act could effect such a result. However, it certainly will not necessarily do so, and, in our view, the Board should not be quick to conclude that it has.

67. In our view, the respondent trade union's breach of section 15 did not warrant a finding that it, or any of the other respondents had engaged in unlawful strike activity. The purpose of the unlawful strike/lock-out remedies in the Act is not to punish. It is to steer parties which have strayed back to an appropriate labour relations course and to put an end to any unlawful conduct in that respect. It will therefore not generally be appropriate to use the unlawful strike/lock-out remedies in the Act when there are other more appropriate and equally effective labour relations remedies available. Having regard to the circumstances of this case including the existence of a very real issue with respect to which voters were employees in the bargaining unit (however incidental that was to the respondent trade union's real position), we did not find it appropriate, in the exercise of our discretion under section 92 of the Act, to grant any unlawful strike declaration or direction.

68. For these reasons, the Board made the findings and declarations and issued the directions set out in its July 9, 1990 decision herein.

0555-90-R Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, Applicant v. Med Siding, Respondent v. Group of Employees, Objectors

Certification - Construction Industry - Employee - Individual allegedly "just happened to show up" at worksite to retrieve a belt and did some unpaid labour - Individual doing bargaining unit work on application date and thus was employee for purposes of certification application - Certificate issuing

BEFORE: *Inge M. Stamp*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

APPEARANCES: *David Watson, Joe Almeida and Luis Camara* for the applicant; *John Ross and Lino Medeiros* for the respondent; *John Ross* for the objectors.

DECISION OF THE BOARD; October 1, 1990

1. This is an application for certification pursuant to the construction industry provisions of the *Labour Relations Act*.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 10, 1980, the designated employee bargaining agency is the United Brotherhood of Carpenters and Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America.

3. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

4. The Board further finds, pursuant to section 144(1) of the Act, that all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The applicant applied for its standard ICI bargaining unit and all carpenters and carpenters' apprentices employed by the employer in Board Areas 8 and 26. We have no evidence before us that any bargaining unit work was performed in Board Area 8. The application only refers to a project in Board Area 26. It is therefore not appropriate to include Board Area 8.

6. There was also filed in opposition to this application 3 affidavits signed by Carlos Camara, Luis Botelho and Steve Arsenault.

7. The respondent and the three persons who signed the affidavits take the position that on the date of application there was only one employee, namely Carlos Camara.

8. The applicant's position is that there were three persons doing bargaining unit work on the date of application.

9. The Board heard the evidence of the owners, Lino and Grace Medeiros, and that of Carlos Camara, Luis Botelho and Steve Arsenault.

10. It was not disputed by the respondent that three persons were at the jobsite on the

application date. However, the respondent submits that Steve Arsenault and Luis Botelho are not employees of Med Siding, except for Camara, who is a working foreman.

11. Lino Medeiros testified that Arsenault came around to the jobsite about 10:00 a.m. on the application date. Medeiros borrowed Arsenault's truck to pick up some strapping material. Arsenault stayed behind and helped Camara. Arsenault was wearing a carpenter's belt which he testified he (Arsenault) had left behind for Medeiros in 1988 when Arsenault worked for Lino Medeiros. Arsenault checked Lino's truck and found his carpenter's belt. He then assisted Camara in putting up fascia. At approximately 2:00 p.m. Arsenault left the site for a physiotherapy appointment.

12. Luis Botelho is a citizen of Portugal who was visiting Canada and staying with Camara. He was scheduled to return to Portugal on August 5, 1990. Botelho testified that he asked to accompany Camara to the jobsite out of interest in the Canadian methods of building homes, and that he did not work for Mid Siding but helped Camara by passing him materials on the scaffold. Camara testified that Medeiros did not know Botelho was going to be on the site. Medeiros denied hiring Botelho.

13. Botelho was on the site for about three days. He brought his lunch to the site from home. He testified that he explained to the union representatives that he was only visiting and would not sign anything, but the union told him it did not matter and to just sign the card. The conversation was in Portuguese. He testified, through the interpreter, that he does not speak or read English. He further stated that Camara paid \$1.00 on his behalf. Earlier in his evidence he said "I gave \$1.00 to the person who told me to sign". In cross-examination Botelho stated that Camara gave him \$1.00 which he gave to the union representative. He said that he did not know what he paid the \$1.00 for and no one explained. He did not ask anyone to explain it to him. It was Botelho's evidence that he had not retained anyone and had not met the lawyer ostensibly appearing on his behalf until the day of the hearing.

14. The owner, Lino Medeiros, saw Botelho on the site during the three days but did not ask him to leave. Botelho was on the scaffold just at the time the union organizers came to the site. It is Botelho's evidence that that was the only time, and that it was only because he wanted to have a look at the scaffold since it was different than the ones used in Portugal. It was also a coincidence that Botelho was holding the carpenter's belt around his waist "to see how it would look". He stated that he never used it but just "looked at it". He was only "trying it".

15. The work performed on the site was the installation of aluminium siding. Medeiros testified that Camara, his employee, was a slow learner and that he, Medeiros, had to start everything for Camara and supervise his work. Normally, Medeiros and Camara work together, with Camar assisting Medeiros.

16. During Medeiros' absence, Arsenault stayed on the jobsite. Arsenault testified in chief that he was just visiting Medeiros and the jobsite but that he did not do anything else. He is on a disability pension and has nothing to do all day. Arsenault further testified that he saw Camara working and "gave him a hand". At that point, the union representative showed up. Arsenault denied receiving any money or benefits in return for helping Camara.

17. Arsenault believed that the union representative was trying to get a union started for "siders" and that by signing a card they would be "helping them to get a union started". Arsenault stated he believed that when he came off disability he could get work through the union.

18. Camara can do the soffit and siding, but Medeiros always puts up the fascia. Camar

testified that he asked Arsenault to give him a hand putting up the fascia. Medeiros told him that Arsenault had worked for Medeiros before.

19. All three witnesses testified that they did not understand what was involved in signing the cards. They believed that they would be able to get union jobs at union rates but that it would not affect Medeiros' company, Med Siding. They felt the union misrepresented the facts. Camara stated that "they did not tell me I would be in the union as soon as I signed". When Medeiros returned, Camara told him about the union organizers visiting the site.

20. After receiving a telephone call from Grace Medeiros on the job site, Lino Medeiros asked whether anyone had signed for the union, whether the men knew what they were signing and what it would do to his company. Medeiros told the men that the union would take over his company and tell him what to do and how much to pay them.

21. Medeiros called Arsenault, Camara and Botelho to come to his house. Mr. & Mrs. Medeiros were present. Lino Medeiros informed them "we are now forced into the union". There was a discussion about what was to be done and Grace Medeiros called their lawyer on the telephone, who spoke with each of the three persons. Mrs. Medeiros translated for Botelho. They were advised they could sign a petition to "resign our names from the union". Arsenault testified he could not afford a lawyer and since Lino was already getting a lawyer and after talking with Lino's lawyer "that was good enough".

22. The affidavits were signed at a second meeting at Medeiros' house. Grace Medeiros went over the documents with them. Mrs. Medeiros telephoned the lawyer, who was also a commissioner of oaths, and he went over the documents with them over the telephone. Mrs. Medeiros acted as interpreter for Botelho. Grace Medeiros took the signed affidavits to their lawyer. The lawyer signed the affidavits as Commissioner of Oaths.

Argument

23. At the conclusion of the evidence presented by counsel for the respondent and the three individuals who had signed the affidavits/petition, counsel for the applicant made a motion that based on the evidence before the Board it should not be required to call any evidence on the issues of the list, the petition and the allegations about the membership evidence.

24. The applicant submits that based on the agreed facts and the evidence at a minimum, two of the three persons in dispute are employees in the bargaining unit. The applicant further submits that the petition is the most involuntary petition presented before this Board in some time. With respect to the allegations raised by the evidence and the affidavits, there is no *prima facie* case against the applicant. There was no impropriety whatsoever. Employees understood what they were signing and were told it would cost \$1.00 and a certain amount later for their first month's dues if they chose to become full members.

25. The applicant submits that the petition should be dismissed and that the Board should find that Camara, Arsenault and Botelho were doing bargaining unit work and are employees within the meaning of the Act.

26. Counsel for the respondent and the three individuals submits that this petition is the worst case scenario - ten things not to do. Counsel submits, however, that these items pertain to Arsenault and Botelho who are not employees of Med Siding. Counsel contends it is preposterous to say Botelho is an employee, especially when Botelho told the organizers he was a visitor. Arsenault used to work at Med Siding. He is a "gadabout" and visits the site, killing time. Medeiros

used the opportunity to borrow his truck to get materials. Arsenault saw Camara needed some help and lent him a hand. Arsenault was doing the respondent a favour.

27. Counsel further submits that the affidavits signed by Arsenault and Botelho are not petitions and are not subject to the petition rules since neither of them is an employee. Counsel referred to paragraph 2 of his covering letter which states:

“Carlos Camara has advised us that he wishes to file the enclosed petition objecting to the certification of the applicant. Steve Arsenault and Luis Botelho wish to file documents indicating that they are not employees of Med Siding, although the applicant seems to think that this is the case. To this extent, the alleged employees are filing a petition in any event, indicating that they are opposing the applicant from being their bargaining agent”.

Counsel stated that there is no inconsistency between the affidavits and evidence. There is no proof showing that they were employees.

28. Counsel argued that there was impropriety in the obtaining of membership evidence. There is reverse intimidation and coercion. The organizers were so friendly that the three persons did not know what they were doing. Counsel submits “it is amazing how they could be swept off their feet so rapidly”.

29. Counsel admitted “it’s a crummy case and a waste of time for everyone. It is not the employer’s fault but it is the way this happened”. The way the membership evidence was collected - “just sign this and it is going to reserve you a spot in Toronto and show them how much money they are going to get”. Counsel contends that there is something wrong in the process when you can get a visitor to Canada to sign up in 15 minutes. The union violated some rules. The applicant made more of an impact on these three individuals and removed any voluntary aspect. Camara did not have full disclosure. He did not read the card. Camara gave the union a business card. He did not know why the union representative wanted to talk to him. Counsel argued that these are inexperienced young guys who do not know anything about the union. The membership evidence is tainted, the whole process is tainted. The damage is done. This case is so bogged down that the Board will never know what happened. Counsel argued that this application should be dismissed and the applicant’s motion should be denied.

30. Counsel contends that the Board should proceed with respect to how membership evidence was obtained.

Decision

31. Having considered the evidence surrounding the origination, preparation and circulation of the affidavits expressing opposition to the application for certification, we do not find that these affidavits or statements of desire represent a voluntary expression of the employees’ wishes. The Board will not give any weight to the statements of desire, in the form of affidavits, before it.

32. With respect to the issue of whether or not Botelho and Arsenault were employees of the respondent on the application date, we will deal first with Arsenault. The facts are not in dispute. Arsenault arrived some time around 10:00 a.m. on the site. He proceeded to help Camara install fascia. Arsenault was the more experienced of the two. Lino Medeiros, the owner, borrowed Arsenault’s truck to pick up materials. When Medeiros returned Arsenault left to keep an appointment with his physiotherapist. Whether it is credible that Arsenault worked without pay and just happened to show up on that particular day and find his “carpenter’s belt” which had been left behind, is not determinative of the issue. What is determinative is that Arsenault was doing bargaining unit work on the application date. The Board in *Calvano Lumber & Trim Co. Ltd.*,

[1989] OLRB Rep. Apr. 337 made the following comments on different forms of employment relationships:

15. Employment relationships may exhibit a variety of forms in different contexts, but the essence of such relationship is the exchange of labour for consideration in some form. Collective bargaining concerns the terms of that exchange and trade union representation permits even small groups of employees to improve them. It does not matter that an individual may not be "employed" or "paid" in a conventional way, nor does it matter that the alleged employee only works sporadically or shows up on the employer's doorstep and is engaged on a casual basis. Casual or day labour is quite common - especially in the construction industry. Finally, we do not think that Mr. Calvano's personal views determine the legal character of the relationship, even if he did not consider Luna to be an employee, did not engage or pay him on the same basis as Comeau, and thought he was merely helping out a friend. And, of course, we do not know Luna's view of the situation. All that we know is that he signed a document which speaks to representation in an *employment relationship*.

33. Botelho gave his evidence in a manner that was evasive and unresponsive. It is not credible that he was just standing on the scaffold "holding a Carpenter's belt" around his waist to see how it would look. It is worth noting that Botelho brought his lunch from home anticipating staying longer than just for a visit on the site to see how things were done in Canada. It is not credible that a person on holidays would spend his day just hanging around a work site. We are satisfied that Botelho was doing bargaining unit work on the day of application.

34. There was viva voce evidence as well as statements contained in the affidavits that Arsenault, Camara and Botelho did not know what they were signing and were misled as to the purpose of the cards they signed. The application for membership of Local 27 states:

APPLICATION FOR MEMBERSHIP

Carpenters and Allied Workers Local 27
United Brotherhood of Carpenters
and Joiners of America.

Date

I,
(please print)

Address

Phone Number

hereby apply for membership in the Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America and hereby of my own free will and accord, authorize the Union or its designate to act for me as collective bargaining agent in all matters pertaining to rates of wages, hours of work and other conditions of employment.

I hereby certify that the amount shown below was paid by me to be applied to initiation fees or monthly dues of the Union, and as evidence of good faith in my application for membership.

Amount ONE X/100 Dollars

SIGNATURE OF APPLICANT

SIGNATURE OF RECEIVER
OF ABOVE MONEY

35. The wording is quite clear. Both Arsenault and Camara speak English. No one suggested that they are illiterate. Botelho did converse with the organizers in Portuguese. His evidence that he did not inquire as to what the card said is not credible. The Board is satisfied that the

three individuals knew or ought to have known what they were signing. The Board rejects the assertion that they were misled.

36. No allegations with respect to the membership evidence were filed with the Board prior to the hearing. The evidence does not show any violations of the Act by the applicant in respect of obtaining membership documents.

37. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on June 8, 1990, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

38. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 2 above in respect of all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

39. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

2096-89-OH Steve Mike Szeghalmi, Complainant v. National Plastic Profiles Inc., Respondent

Discharge - Evidence - Health and Safety - Witness - Employee discharged after discussing petition for a lunchroom with another employee - Board permitting employee to recall employer's witness - Employee discharged for reasons unrelated to health and safety - Majority unwilling to exercise discretion under section 24(7) of *Occupational Health and Safety Act* to modify penalty - Exercise of discretion under Section 24(7) inappropriate where no connection between health and safety concern expressed by employee and employer conduct or actions - Complaint dismissed

BEFORE: M. A. Nairn, Vice-Chair, and Board Members J. A. Rundle and P. V. Grasso.

APPEARANCES: David G. Leitch and Steve Szeghalmi for the complainant; David Zimmer for the respondent.

DECISION OF M. A. NAIRN, VICE-CHAIR AND BOARD MEMBER J. A. RUNDLE; October 11, 1990

1. This is a complaint alleging that the respondent violated subsection 24(1) of the *Occupational Health and Safety Act* (the "O. H. & S. Act") in terminating the complainant's employment. The relevant provisions of the *Occupational Health and Safety Act* provide as follows:

24.- (1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply with all necessary modifications to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 89 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act.

(4) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), sections 102, 103, 106, 108 and 109 of the *Labour Relations Act* apply with all necessary modifications.

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

.....

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

....

2. The complainant asserts that he was terminated because he was planning to prepare and circulate a petition requesting a lunchroom on the respondent employer's premises. Although the complainant led evidence of other concerns regarding certain health and safety matters, for example, the provision of pressure gauges, the availability of respirators, and ensuring available hot running water for employees' use, he did not suggest nor seek to rely on the respondent's conduct with regard to any of these matters. The respondent was aware of the various concerns raised and had undertaken limited improvements in some areas. It appears that the complainant felt these actions to be insufficient. We are satisfied however that the respondent did not have these concerns in mind in deciding to terminate the complainant's employment. Nor, as we have indicated, did the complainant so suggest.

I

3. At the end of his case, counsel for the complainant sought leave of the panel to call Mr. Punambalam, the plant manager, to testify. Because of the reverse onus provision in subsection 24(5) the respondent's case had proceeded first and this individual had been called as a witness by the respondent as part of its case. Counsel for the respondent objected to this request.

4. The complainant argued that there is no rule of evidence that stipulates that a witness that has been called once cannot be called again. He argued that if a witness were to give evidence that was incomplete or inaccurate and that fact subsequently came to the attention of counsel, there would be no sound policy reason for precluding that witness from being called again to give evidence. He then went on to say that the purpose for which the witness would be called should be limited. It would not be for the purpose of merely giving evidence again but it would have to be in relation to something new.

5. The panel requested and then directed that the complainant outline the nature of the evidence he was seeking to introduce. Although initially the complainant objected to doing so, he later acknowledged that it was helpful in dealing with the respondent's objection in that the panel could see that the evidence was (as he defined it) new. The respondent reviewed each of the particulars provided. With the exception of paragraph 7 which appeared to be directed at why the witness might have "changed his mind" with respect to his evidence, the respondent argued that each of the particulars had already been dealt with in the witness's earlier testimony. The complainant had had every opportunity to cross-examine the witness and had failed to make use of that opportunity. Consequently counsel urged the Board to exercise its discretion not to hear the witness. Both parties agreed that whether or not to allow Mr. Punambalam to testify was a matter within the panel's discretion.

6. Counsel for the complainant provided the following particulars:

1. Mr. P will give evidence that the problems with production on the evening of October 16, 1989 were related to technical difficulties with the extruding machine as set out in Exhibit #3, in particular, the malfunction of a cooling fan and that he so advised Jim Klassen.

2. Mr. P will testify that he overheard Luther telling Jim Klassen that Steve S. was talking to employees about their rights to a clean eating area, etc. and that Steve was circulating a petition demanding that certain requirements of the O. H. & S. Act, as set out in the complaint, be respected by the employer - these conversations took place just prior to Steve's dismissal.
3. Mr. P will testify that Steve did what he was told by Mr. P and was a good employee about whom complaints of overall poor job performance could not be made.
4. Mr. P will testify that Exhibit 2 was not prepared on October 17th but some time later and that Jim Klassen told him that it was prepared to cover-up the real reason for Steve's dismissal.
5. Mr. P will testify that employees did not generally eat in his office due to clutter, mess and lack of chairs.
6. Mr. P will say he witnessed the incident of Mr. Klassen removing the tea kettle from his office and that he was rude about it.
7. Mr. P will testify about why he gave evidence in favour [sic] on Jan 4th when he, in fact, believed Steve to be a good worker.

7. We ruled that we would hear the evidence of Mr. Punambalam with respect to the matters outlined at paragraphs 4 and 7 of the particulars. Further, the witness was the complainant's witness for purposes of examination-in-chief, the respondent had the right of cross-examination on those matters and the respondent retained its right to call reply evidence. The complainant has requested our written reasons for that ruling.

8. Notwithstanding that the Board has the authority to receive evidence that would not otherwise be admissible in a court of law (s. 103(2)(c)), the exercise of discretion to receive or refuse evidence must be exercised fairly and in the interests of justice. It is our view that this includes having regard to maintaining the integrity of the process.

9. Assuming that the complainant has the option of calling Mr. Punambalam as a witness in his own case does not answer the concern. By seeking to call Mr. Punambalam the complainant is seeking to impugn the evidence of Mr. Klassen and Mr. Callender, two witnesses called by the respondent.

10. Obviously, the panel has concerns about having the appropriate evidence before it in order to be able to reach a decision. However, the adversarial process is such that the adjudicator must rely on the parties to present the evidence within established principles designed to protect all the parties. It is the particulars outlined in paragraphs 1 and 2 that caused the panel the most serious concern. There is no doubt that the evidence would be relevant to the dispute. The question however is one of ensuring that all of the parties to the process had and have a fair opportunity to present their case.

11. This is a situation in our view that is analogous to the problem contemplated in *Browne and Dunn*, (1986), 6 R 67 (H. L.). This evidentiary principle seeks to ensure fairness to the witness. Where a party intends to challenge or contradict the evidence (and inherently the credibility) of a witness by subsequently calling other evidence, the witness is to be put on notice of the appar-

ent contradiction in order that they have the opportunity to make any explanation. Failure to cross-examine would generally be taken to indicate an acceptance of that witness's account of events. In this case there was not a complete failure to cross-examine. To the extent that questions were asked and answers given, they were clearly consistent with the witness' evidence in chief. In any given case there will be some debate as to how explicitly the witness must be advised of the intended challenge, in order to fairly allow him the opportunity for explanation. In this case we were not satisfied that in the cross-examination of Mr. Klassen or Mr. Callender their answers, and in turn their credibility, were being made the subject of challenge by the complainant. Nor is the complainant in the position to argue that at the time these witnesses were cross-examined he did not intend that their evidence would be subject to challenge.

12. Paragraph 1 of the particulars seeks to have Mr. Punambolan testify to the reasons for the lack of production on the complainant's machine on October 16, 1989. Mr. Punambolan was cross-examined by the complainant about the production problems on the evening of October 16, 1989. He was asked whether he received an explanation from the complainant for the loss of production and whether he had accepted that explanation. The witness agreed that he had received an explanation and had accepted it. Counsel for the complainant then sought to establish that the production problems on October 16th could not be attributed to any fault on the complainant's part. The witness qualified his earlier answer to state that on the next day the machine again worked. Counsel for the complainant asked if that was because the machine had cooled off. The witness did not deny the proposition. Counsel moved to another area of questioning. Counsel did not suggest to the witness that the problems were as a result of a malfunctioning cooling fan or that the witness had knowledge of this. The complainant in his evidence gave a detailed account of the production problems on October 16th, including filing as an exhibit notes he had prepared at the time, and including evidence of his discovery of a malfunctioning cooling fan. The complainant's view of events regarding the lack of production on October 16th clearly was available from the outset of the proceedings.

13. The question of whether or not Mr. Punambolan advised Mr. Klassen, the general manager, of the events of October 16th was not dealt with at all in cross-examination of either Mr. Klassen or Mr. Punambolan. Both parties knew that the lack of production occurring on October 16, 1989 was treated by the respondent as the culminating incident leading to discharge. The issue in this case is whether the complainant was discharged for reasons relating to the exercise or attempted enforcement of his rights under the *Occupational Health and Safety Act*. In any case where an employer asserts cause for discipline or discharge and denies an anti-union motive (in violation of the *Labour Relations Act*) or motive in contravention of section 24 of the *Occupational Health and Safety Act*, a complainant will seek to impugn any evidence raised that would go to show that the employer had cause. To the extent that the complainant here can show he bore no fault for the lack of production it goes to undermine the legitimacy of the employer's assertion. The question of whether or not Mr. Klassen was advised by, or discussed with Mr. Punambolan, any matter relating to production on October 16th was not put to Mr. Klassen.

14. The evidence sought to be adduced with respect to paragraph 2 of the particulars goes to the issue of employer knowledge of the complainant's purported health and safety activity. The complainant sought to adduce the evidence of Mr. Punambolan on the basis that counsel could not possibly have known about it at the time he was conducting his cross-examination. That is not the case. We heard evidence from Mr. Thompson, a witness for the complainant, who testified that he had overheard a rumour to the effect that Luther Callender had informed Jim Klassen of the complainant's purported health and safety activity. Mr. Thompson testified that he heard the rumour two to three weeks after the complainant's dismissal. More pertinent is that the source of this rumour was Mr. Punambolan and that Mr. Thompson had been told by Mr. Punambolan that it

was the latter who had overheard Mr. Callender. In addition, the complainant testified that he did not file his complaint until some weeks after his discharge because it was only after a conversation with Mr. Thompson concerning this rumour that it occurred to him that the respondent's real motive in terminating his employment might be for grounds relating to his purported health and safety activity. He testified that it was this knowledge that caused him to file the complaint. All of this information was clearly available to the complainant and his counsel prior to the first day of hearing.

15. In his cross-examination, Mr. Callender denied speaking to Jim [Klassen] or Joe [Punambolam] regarding the complainant talking to employees about a lunchroom. The cross-examination on that issue went no further.

16. In Mr. Klassen's cross-examination he was asked whether he had been told by Luther [Callender] that the complainant was organizing a petition. Mr. Klassen denied having any knowledge of a petition or organizing. The cross-examination on that point went no further. He had testified in chief that his first information was upon receiving the complaint.

17. In the case of both Mr. Callender and Mr. Klassen the veracity of their evidence on these points was not tested. The complainant also did not raise any of these matters in his cross-examination of Mr. Punambolam.

18. Complainant counsel argued that he need not have cross-examined because he had no expectation of getting a favourable response. That is not the basis upon which to limit cross-examination. One may well anticipate an unfavourable response from a witness called by another party. However one might wish to be careful before always assuming that a witness will be untruthful. In addition cross-examination is designed to examine the circumstances surrounding any "unfavourable" response in order to determine whether it is consistent with other evidence and to examine the interests, perceptions, and general credibility of the witness. The matters raised in paragraphs 3, 5 and 6 are all matters which could have been raised and in fact to an extent were raised and dealt with in the cross-examination of Mr. Punambolam. This is not a situation where a party receives information material to the dispute that it was not aware of or could not reasonably have been aware of through the exercise of due diligence. It is a situation where witnesses would be left in the position of having had no opportunity to explain any alleged contradiction.

19. We ruled we would allow Mr. Punambolam to give evidence on the matters identified in paragraph 4. Although those matters could well have been canvassed in Mr. Punambolam's cross-examination, there is nothing to suggest that the complainant previously intended to challenge Mr. Klassen's evidence on this point and knowledge of a purported "cover-up" might well be information that would remain exclusive to the individuals involved.

20. Paragraph 7 of the particulars is in essence the witness's explanation of why he might now "flavour" his evidence somewhat differently. To the extent that there may have been evidence relevant to the witness's credibility we allowed evidence on this point as well.

21. The panel also considered whether we could feel confident that the respondent would not be prejudiced in its right to a fair hearing by acceding to the complainant's request. This included consideration of whether the opportunity to cross-examine and to call reply evidence would be sufficient. We were satisfied that there was substantial potential for prejudice to the respondent in this case. The complainant argued (and most specifically with respect to paragraphs 1 and 2) that the evidence was central to the dispute and therefore not to hear it would be a denial of the complainant's right to a fair hearing. The fact that it is material to the dispute however only enhances our concern that the respondent might well be prejudiced and it suggested a heightened

responsibility on the part of the complainant to take advantage of the opportunity that he did have to present his case fully. Accordingly, we ruled as we did.

II

22. The complainant developed the idea of circulating a petition requesting a lunchroom. He approached Mr. Thompson and Mr. Sonny, two other employees, to discuss the idea and showed them the "green book", referring to the consolidated copy of the *Occupational Health and Safety Act and Regulations for Industrial Establishments*. Mr. Callender, another employee, denied that the complainant had ever spoken to him regarding a petition. He could not recall having been shown the "green book". When provided with a copy of it, he testified that he had not seen it before. He had not seen the book being shown to other employees nor heard any discussion regarding a petition with other employees. He acknowledged in cross-examination that he did discuss with the complainant that there was a need for a lunchroom although it also seems his concern was less than the complainant's.

23. The complainant subsequently asserted that he had shown the green book to Mr. Callender and had discussed the petition with him. The only other evidence on this point was hearsay evidence from Mr. Thompson to the effect that the complainant had told him that Mr. Callender had been shown the book. On the evidence we are not prepared to conclude that Mr. Callender was aware of any activity on the complainant's part to either show the green book to employees or to organize and circulate a petition.

24. The evidence of Mr. Sonny is not helpful both because of its very general and hearsay nature and in light of our assessment of his overall credibility. We heard evidence from the complainant regarding the removal of the complainant's tea kettle from one of the respondent's offices and the apparent failure of the respondent to provide an adequate alternate location. It would appear that this action motivated the complainant to develop the idea of the petition. The incident involving the moving of the tea kettle bothered Mr. Sonny, he stated that the complainant spoke up indicating a need for a better place to have tea and better facilities "health wise". He testified he heard about this a week before the complainant was fired. There is no other evidence with respect to where he heard it, from whom, or what was actually said.

25. In cross-examination Mr. Sonny denied having spoken about the case with either the complainant or his counsel prior to testifying. He denied having any knowledge of the fact that he was going to be subpoenaed. The subpoena had been mailed to him. The witness was not re-examined on any of those points. At that stage of the proceedings we adjourned for lunch. Upon reconvening, counsel for the complainant advised the panel that he was seeking leave to recall Mr. Sonny because he had lied. There was no objection taken by the respondent. The witness had in fact met with counsel and the complainant before the hearing. Counsel posed that the witness had understood the questions in cross-examination to be directed at whether counsel for the complainant had asked him to say things that were incorrect. The answer to that latter proposition was no.

26. We have serious concerns regarding the veracity of Mr. Sonny's evidence. It would be highly unlikely that he would not have spoken to either the complainant or complainant's counsel prior to testifying. We are also satisfied that the questions put to him in the cross-examination were clear. We are not prepared to place any weight on his explanation after having been recalled as a witness. Not only was the explanation provided in a leading manner but, any clarification or correction ought to have been done through re-examination of the witness.

III

27. At its highest the evidence discloses that the complainant showed the "green book" to Mr. Thompson and Mr. Sonny and that he discussed with them the idea of a petition as a means to exert pressure on the respondent to set up a lunchroom for the employees. We note that no petition was ever actually prepared. The complainant asserts that this activity falls within the ambit of seeking to enforce the *Occupational Health and Safety Act* and/or its regulations. The respondent did not dispute that assertion. In determining whether the respondent violated subsection 24(1) of the *Occupational Health and Safety Act* we must decide whether the respondent terminated the complainant's employment because he was seeking to enforce the *Occupational Health and Safety Act* or its regulations by seeking to prepare and circulate a petition requesting a lunchroom.

28. Mr. Klassen was employed as general manager in the early fall of 1989. The complainant was terminated on October 17, 1989. Mr. Klassen was also a new partner in the business which had changed hands in the summer of 1989. The complainant had been employed by the previous owner since about March 1989, as had Mr. Callender, Mr. Sonny and Mr. Punambolam.

29. Mr. Klassen asserted that he had cause to terminate the complainant's employment. On the morning of October 17, 1989 he arrived at work to learn that there had been no production from the complainant's machine the night before. This was, in Mr. Klassen's mind the final straw. He prepared a letter of termination, and had it typed. Upon arriving for his shift that day, the complainant met with Mr. Klassen and Mr. Punambolam to discover that his employment was being terminated. There is no suggestion that Mr. Punambolam participated in the decision. Mr. Klassen stated he discharged the complainant for reasons of overall poor performance. He agreed with counsel for the complainant that he had in mind a number of reasons at the time of discharge but did not provide them to the complainant in that he did not feel obligated to do so.

30. Following that very brief termination meeting, Mr. Klassen, with the assistance of his secretary, prepared the document filed as Exhibit 2, setting out the reasons for termination. We heard considerable evidence about when this document was prepared. The complainant challenged the timing of the preparation of Exhibit 2 in order to suggest that the reasons it outlined were not the real reasons for termination. However Mr. Punambolam saw the document the following day.

31. Mr. Punambolam was also called to testify that the creation of Exhibit 2 was for the purpose of covering up the "real reason" for the complainant's termination. Mr. Punambolam's evidence was that Mr. Klassen showed him Exhibit 2 on the 18th and remarked that this was to "cover our ass". There was no suggestion in Mr. Punambolam's evidence that Mr. Klassen in any way indicated that the reasons for the complainant's termination were anything but those stated. Mr. Klassen, although he denied using the words "cover our ass" frankly acknowledged that he set out the notes for purposes of a record. We note that Mr. Klassen has been a police officer and that he was familiar with the taking of notes for future purposes. The fact of making notes in and of itself is not conduct that can be impugned. There is nothing further in the evidence to suggest that Mr. Klassen was doing anything except recording those reasons that were in his mind in deciding to terminate the complainant's employment.

32. Mr. Klassen put forward essentially five reasons for terminating the complainant's employment. The first was a concern with respect to the complainant's chronic lateness in arriving at work. It was Mr. Klassen's view that the complainant simply disregarded any concern that had been expressed and continued to arrive late. The complainant justified his behaviour on the basis that he was either picking up other employees or that personal responsibilities interfered with his being on time. He asserted that other employees were also late. However, there was no explanation either to the employer or before us as to whether he could adjust his other responsibilities or

was in any way willing to acknowledge the employer's legitimate concern. Whether or not the complainant had been formally warned with respect to his lateness it is clear that he understood that the respondent was unhappy with this aspect of his attendance.

33. The second and third reasons Mr. Klassen provided are related. He had received complaints from employees, specifically from Mr. Callender and Mr. Sonny on September 29, 1989 to the effect that the complainant was not pulling his weight in the shop. They were unhappy that the complainant would attend at their machines and adjust controls either in their absence or without their request. This was confirmed by Mr. Callender and denied by Mr. Sonny. We prefer the evidence of Mr. Klassen and Mr. Callender in this regard. The three employees are machine operators. It was acknowledged by all that in the processing and moulding of plastics the machines are temperamental. An operator gets to know his machine and works with it to produce a quality product. It was also understood, as the complainant testified, that although one might seek advice from his co-workers (with respect to the setting of controls on a machine for example) he would expect them not to make the adjustments themselves but to leave that to the operator. Part of Mr. Callender's and Mr. Sonny's complaint was that the complainant did not respect this understanding when it came to their machines. Mr. Klassen raised these matters with Mr. Punambalam who advised him that he would deal with it.

34. Mr. Klassen also observed the complainant in places where he thought he ought not to be, on other machines, or on the phone. He again spoke with Mr. Punambalam about these things. Mr. Klassen acknowledged that he had never spoken to the complainant directly about these concerns.

35. In reviewing Mr. Punambalam's evidence it is apparent that Mr. Klassen did raise these concerns and a general concern about the complainant's performance with him. It also appears that Mr. Punambalam either felt these concerns to be exaggerated and/or was unwilling to be the "messenger of bad news". It is not apparent that the complainant was ever advised of these difficulties with respect to his performance.

36. The fourth matter raised by Mr. Klassen was his assessment of the complainant's response to the introduction of a time card. This occurred in the first week of October 1989. The complainant advised Mr. Klassen that there would be "problems" with a time clock. Upon inquiring of the nature of those problems the complainant referred to the taking of breaks. Mr. Klassen advised the complainant to take his breaks. This was not denied by the complainant. The complainant only asserted that he would not be able to take his breaks because the other workers did not.

37. The final reason advanced by Mr. Klassen for the termination was the fact that the complainant's machine was down on October 16th resulting in a lack of production. He also observed that the area had not been cleaned in a way that he felt appropriate. He was also aware that the machine had operated both the shift prior to and immediately following the complainant's.

38. The complainant argued that in order to discharge the onus on it, the respondent must show that overall poor performance was the real reason for termination and asked the panel to consider whether the respondent had proven overall poor job performance. We would state the issue somewhat differently. The issue in subsection 24(1) is not whether there was just cause for termination but whether in terminating the complainant's employment the respondent had in mind any reason relating to the complainant's acting in compliance with, or his seeking enforcement of, the *Occupational Health and Safety Act* or its regulations (an "anti-health and safety motive"). (See *Commonwealth Construction Company* [1987] OLRB Rep. July 961 at paragraph 21.) The complainant also argued that in order for the reasons for discharge to be convincing they must

have a temporal connection with the actual termination. In this case that connection existed only with the production problems on October 16 for which the complainant could not be held responsible.

39. Exhibit 2 notes that the complainant stated that his machine would not run properly. Apart from this, the evidence does not establish that Mr. Klassen was aware of any explanation for the lack of production on October 16th. It is clear from the evidence of both Mr. Klassen and Mr. Punambalam that they perceived that the amount of production time lost was higher at those times when the complainant was operating a machine than it was for other employees. The complainant did not deny this but asserted that this was because his concerns with respect to quality control were greater. It also appears that by and large Mr. Punambalam accepted or did not challenge the complainant's explanations regarding loss of production time. The same however could not be said for Mr. Klassen. Mr. Punambalam knew that Mr. Klassen and the complainant "never seen things together". On the whole we take this to mean that Mr. Klassen and the complainant did not see eye to eye with respect to matters relating to production and job performance.

40. The complainant provided us with a detailed explanation as to why his machine had not operated on October 16th. It also appears that Mr. Punambalam accepted this explanation. It is clear that Mr. Klassen had continuing concerns about the complainant's employment. From Mr. Klassen's point of view there appeared to be no improvement in the complainant's performance. The complainant was not advised through Mr. Punambalam of the extent and degree of these concerns. Nor was he told that his job might be in jeopardy. Even assuming that Mr. Klassen had been given an explanation it is not apparent to us that it would have made any difference to him. Nor did it occur to the complainant until in conversation with Mr. Thompson some time later that his employment might have been terminated for reasons other than his performance.

41. Whether the evidence of ongoing lateness, higher lost production time, and complaints from co-workers, in the context of the respondent's failure to fully advise or inform the complainant of its concerns would warrant a finding of just cause for termination is not the issue before us under subsection 24(1). We are not satisfied that Mr. Callender had any knowledge of the complainant's activity in seeking to prepare and circulate a petition. Nor are we satisfied that the respondent had such knowledge. As referred to earlier, other more serious health and safety concerns raised were dealt with at least in part by the respondent without consequence to the complainant. On the evidence we are satisfied that in terminating the complainant's employment, the respondent did not take into account the complainant's activity in seeking to prepare and circulate a petition regarding a lunchroom. Therefore there is no violation of subsection 24(1) of the *Occupational Health and Safety Act*.

IV

42. The complainant submitted that absent a finding of a violation of subsection 24(1), the panel should apply subsection 24(7) of the *Occupational Health and Safety Act* and perform essentially an arbitral function. He submitted that the reasons of poor performance expressed by the respondent did not justify the discharge of the complainant and that we ought to review and modify the penalty. The complainant in this case is not covered by a collective agreement. He is seeking reinstatement to his former job and damages for mental distress.

43. The complainant submitted that we need not determine whether the *Occupational Health and Safety Act* regulations relied on did in fact apply but only that the complainant had a genuine health and safety concern. Further, there was no suggestion in this case that the complainant's concerns were not genuine.

44. It was the position of the respondent simply that subsection 24(7) was discretionary and on the facts of this case the panel ought not exercise that discretion because the termination package provided to the complainant was sufficient. Notwithstanding that the respondent was aware that the complainant was seeking reinstatement, we heard no evidence of the nature of any termination package. We also note that there was no suggestion that the contract of employment in this case contained a specific penalty for any of the infractions relied upon.

45. The complainant relied on *Butler Metal Products*, [1988] OLRB Rep. Oct. 1003 in his argument for applying subsection 24(7) of the *Occupational Health and Safety Act*. However that case does not deal with subsection 24(7). In that case the complainant was found to have expressed a genuine health and safety concern and the respondent was found to have discharged the complainant in violation of subsection 24(1) of the *Occupational Health and Safety Act*.

46. In the circumstances of this case we are not prepared to exercise our discretion under subsection 24(7) to consider modification of the penalty imposed. As discussed in *Commonwealth Construction Company, supra*, employees covered by a collective agreement and having the right to proceed to arbitration have been given, under subsection 24(2), the option of choosing their forum to have these issues resolved. Employees not covered by a collective agreement do not have a right to proceed to arbitration to have the issue of just cause determined. Rather they have the right to file a wrongful dismissal action in the courts. In either case, a forum for determining the issue of cause exists. Section 24 of the *Occupational Health and Safety Act* exists to protect employees when raising health and safety concerns. It does not in our view, supplant the primary forum for determining the issue of cause. However there may well be cases where those issues appear joined and in our view subsection 24(7) addresses those situations. For example, an employer may take action against an employee which is not in violation of subsection 24(1) in circumstances where the employee genuinely but mistakenly believes that he or she is engaged in protected health and safety activity. Subsection 24(1) alone would not provide adequate protection to the employee. Subection 24(7) should be interpreted so as not to discourage the raising of health and safety concerns. In these circumstances, there will be a *bona fide* health and safety concern on the employee's part, and in addition, a connection between that concern and the actions of the employer which do not amount to a violation of subsection 24(1). In such a case, it would be appropriate to consider, absent a specific penalty for the infraction, whether the penalty imposed was just and reasonable in all the circumstances (see for example, *Ministry of Community and Social Services v. Douglas Lloyd*, [1988] OLRB Rep. Jan. 50; *Commonwealth Construction Company, supra*; *The Corporation of the City of Ottawa*, [1986] OLRB Rep. June 798; *Camco Inc.*, [1985] OLRB Rep. Oct. 1431; *Baltimore Aircoil of Canada*, [1982] OLRB Rep. March 327; and more recently, *Bilt-Rite Upholstering Co. Ltd.*, [1990] OLRB Rep. July 755).

47. However, where, as here, there is no connection whatsoever between the health and safety concern expressed by the employee and the actions or conduct of the employer, we do not think it appropriate to exercise our discretion under subsection 24(7). The actions of the employer in terminating the complainant's employment bear no connection or nexus to the complainant's proposed preparation or circulation of the petition. The purpose of section 24 is protected and maintained. We do not believe that the existence of subsection 24(7), absent a relationship between the employer action and the *bona fide* health and safety concern of the employee provides a greater right with respect to the issue of cause than would otherwise be available.

48. Therefore, having regard to all of the above, this complaint is dismissed.

1. I am of the view on the evidence before us that the complainant was terminated by the respondent in violation of subsection 24(1) of the *Occupational Health and Safety Act* ("O. H. & S. Act").

2. Section 24 prohibits an employer from responding in the ways outlined in subsection (1) paragraphs (a) to (d) because a worker has sought enforcement of the Act or the regulations. A worker may seek enforcement by complaining to the employer, by contacting an O. H. & S. inspector, by making a complaint under the Act, or by other means.

3. In this case the complainant sought to enforce the Act in discussing the possibility of circulating a petition for other employees to sign; the petition was to request that management provide a lunchroom.

4. Two employees testified that the complainant had discussed with them the idea of a petition and were shown a "green book" identified as the *O. H. & S. Act and Regulation*. Another employee, Mr. Callender, testified that the complainant had never spoken to him about a petition, he did not remember any "green book". The complainant asserted that he had shown the green book to Mr. Callender and had discussed the petition with him. In cross-examination, Mr. Callender admitted that the complainant had talked to him about the need for a lunchroom in order for the employees to have a clean place to eat their lunch. Mr. Callender admitted also in cross-examination that he had been promoted to shift leader shortly before the complainant was discharged.

5. An employee seeking enforcement of the O. H. & S. Act is protected by the Act in order to encourage employees to raise health and safety matters with their employer and others in order to reduce the probability of injuries or illness in the workplace.

6. Subsection 24(5) of the O. H. & S. Act also makes it clear that the onus of proof lies upon the employer to satisfy the Board that its decision was not contrary to the Act.

7. At the time of termination the complainant was handed a Notice of Termination, the first sentence of which said, "This notice is to inform you that effective immediately, your employment with this firm has been terminated due to poor performance." When the complainant asked specifically why he was being terminated, he was advised by Mr. Klassen that it was because of his overall performance.

8. However, a second document, exhibit #2 dated October 17, 1989, 3:00 p.m. lists four reasons for the termination. The complainant was never reprimanded or suspended for any of the other reasons and according to Mr. Klassen's own testimony he didn't know whether the other reasons were actually brought to the attention of the complainant. The second document was simply typed and placed in the file.

9. Although the complainant did not seek to rely on the matters of the provision of pressure gauges, respirators or hot water, I can only conclude that Mr. Klassen must have been aware of the complainant's concern with health and safety issues. In my view, Mr. Klassen was also aware that the complainant was attempting to get support from other employees in order to compile a list of health and safety issues to present to the company. Mr. Klassen felt that the complainant was starting to be a "pain in the butt", and decided to do something about it. The opportunity presented itself on October 17, 1989.

10. The fact that Mr. Klassen had no specific reasons to give the complainant for the discharge, and the fact that he saw fit to compile a list of reasons after he had discharged the complainant lead me to believe that the reasons he gave to the complainant at time of termination and

the reasons outlined in exhibit #2 are a smoke screen to cover up the violation of the O. H. & S. Act.

11. In *Commonwealth Construction Company*, [1987] OLRB Rep. July 961, the Board dealt with a complaint such as the one before us and stated at paragraph 21:

21. The issue we must decide is why the complainants were discharged. This turns on our finding of the facts, based on our assessment of the evidence and whether we believe the company's claim that it discharged them because they wouldn't perform their work, or the complainants' claim that they were performing their work and never took company time for their pursuits, and were discharged because they raised safety matters. Put in terms of the statutory language, were the complainants discharged because they acted in compliance with the Act or because they sought its enforcement? It is important to understand that what is protected by the Act is the right of employees not to be threatened or disciplined because of their acting in compliance with the Act (or regulations etc.) or seeking its enforcement. An employee might engage in conduct warranting discipline, and in those circumstances an employer can impose discipline, provided the discipline is not motivated even in part by a concern that the employee was acting in compliance with or seeking to enforce the Act. Discipline levied for that reason is proscribed by section 24(1). Whether a breach is found will depend on whether the Board concludes that the disciplinary response was even partially prompted because the employee was seeking to exercise his or her rights under the Act. In this respect, the Board's inquiry under section 24 of this Act parallels the nature of the inquiry under section 89 of the Labour Relations Act.

12. In *Commonwealth Construction, supra*, the Board decided that the complainants had not been dealt with contrary to subsection 24(1) and went on to consider the application of subsection 24(7) which provides as follows:

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

13. At paragraph 35 of *Commonwealth Construction, supra*, the Board concluded:

35. As well, the working of subsection 24(7) on its face gives the Board the jurisdiction to substitute such penalty as the Board considers just and reasonable, even though the Board has not found the employer to have violated subsection 24(1) and even though the Board "determines that a worker has been discharged or otherwise been disciplined by an employer for cause". In circumstances such as those in the instant case, where the Board has determined that the employer has not breached the Act in its discharge of an employee, it is both sensible and in accord with the specific wording of subsection 7 for the Board to then inquire whether the employer's disciplinary response was nevertheless appropriate in all the circumstances. Under subsection 24(2), a worker under a collective agreement has a choice of adjudicative forum where a contravention by an employer of subsection 24(1) is alleged, and the worker may elect to have the matter dealt with either by arbitration or by filing a complaint with this Board. The legislature has set up a mechanism under section 24 whereby the worker can have both the occupational health and safety allegation and the merits of the discipline dealt with in one forum, either final and binding arbitration or through a complaint to the Ontario Labour Relations Board. The scheme of section 24, the impact of subsection 24(3), and the language used in subsections 24(2) and 24(7), support the view that the legislature intended that the adjudicative forum chosen by the worker would deal with both the alleged breach of section 24(1), and, in the event the adjudicative tribunal found the employer had not breached the Act, with the issue of whether the specific penalty imposed by the employer for cause was just and reasonable in all the circumstances. No valid labour relations purpose would be served by reading section 24(7) to any other effect.

In my opinion the interpretation of subsection 24(7) in the *Commonwealth Construction* decision is the appropriate interpretation to be applied in the circumstances of this case.

14. On my review of the evidence and given the approach outlined at paragraph 21 of the *Commonwealth Construction* case, I would have found a violation of subsection 24(1) of the Act.

15. In the alternative, we have jurisdiction under subsection 24(7) of the Act to consider modification of the penalty imposed and to substitute such other penalty or discipline as to the Board seems just and reasonable in the circumstances. I would have found that the company had no sufficient cause to discharge the complainant and would have exercised my discretion under subsection 24(7) to order the complainant reinstated with compensation.

0107-90-OH Manuel Puche, Complainant v. Bo Ramjit, Respondent

Arbitration - Health and Safety - Practice and Procedure - Complainant alleging that respondent failed to comply with Board order - Board treating complainant's letter as notification of a failure to comply - Board to file copy of decision with Supreme Court

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *M. Rozenberg* and *K. Davies*.

DECISION OF THE BOARD; October 30, 1990

1. The Board has received the following letter dated September 11, 1990 from the respondent:

It is most important that the decision handed down August 30-1990 be appealed.

I strongly disagree with their decision and failure to consider the real reason for Manuel Puche dismissal.

It is also of [sic] my opinion that Louisa M. Davie went beyond her Post and acted as counsel on many occasions for the complainant, [M. Puche] during the trial.

It is of my greatest intrest [sic] that this case be heard before an Appeal Board.

2. Mr. Puche responded to this request by letter dated October 8, 1990 as follows:

Further to your letter dated October 1, 1990, in regards to Mr. Ramjit dissaproval [sic] of the decision rendered by the Board, I am writing to you to object to further pursuing this matter before an Appeal Board, as pretended by Mr. Ramjit.

Mr. Ramjit's allegations are not sustained. The decision rendered by the Board was based on a very impartial and fair manner, on what was declared by both parties during the hearings. Therefore, I see no reasons to begin new hearings. I only wish to settle this matter once and for all, as I have a job and my family to look after, and have no time to waste with Mr. Ramjit.

3. Under section 106(1) of the *Labour Relations Act* the Board has the discretion to reconsider any decision it has made.

4. The basis upon which the Board normally exercises this discretion is set out in its juris-

prudence and, in particular in Practice Note No. 17 of the Board's Rules of Procedure (a copy of which is appended to this decision for the benefit of the parties).

5. In his request for reconsideration the respondent does not indicate an intent to adduce new evidence which was not previously available to him by the exercise of due diligence. Indeed there is no suggestion that the respondent has any additional evidence which, if proved, could affect the outcome of the case. The respondent does not request reconsideration because he has new evidence or wishes to make representations which he did not have a previous opportunity to raise. The respondent's request for reconsideration on this basis is therefore dismissed.

6. In respect of the respondent's assertion that the Vice-Chair acted as counsel to the complainant the Board notes paragraph two of its decision dated August 29, 1990:

2. The Board notes that the complainant and the respondent appeared without legal counsel. The respondent acted on his own behalf although he did have an advisor present on the first day of the hearing. The Board commented that there was no requirement that persons appearing before the Board have legal counsel. The Board not infrequently conducts hearings where one or more parties are unrepresented. The Board noted however that Board hearings are legal proceedings and persons appearing on their own behalf do bear any risk involved with appearing on their own behalf. We indicated that the Board's function is to adjudicate. It would be inconsistent with our role as adjudicators to become an advocate for, or advisor to, any party to the proceeding because that party is unrepresented by counsel. In this instance however, the Board did explain the process to be followed to the complainant and the respondent both initially and throughout the proceeding. We also indicated, at various stages of the proceedings, that the issue before the Board was whether the respondent had discharged Mr. Puche because of Mr. Puche's attempt to exercise rights under the *Occupational Health and Safety Act*.

7. It is the normal or usual practice of the Board to conduct itself in this manner where one or more parties appearing before it are unrepresented by legal counsel. This was the practice followed by this panel of the Board throughout the hearing without complaint from either party to the proceeding. We note in particular that during the course of the hearing the respondent raised no objections to the manner in which the hearing was conducted. The respondent's request for reconsideration on this basis is therefore also dismissed.

8. We note also that by letter dated September 19, 1990 Mr. Puche wrote to the Board as follows:

Further to the copy of the Board's Decision, of file 0107-90-OH, dated August 30th, 1990, I would like to bring to your attention that, to this date, I have not received any notice of any kind pertaining to the amount of four thousand five hundred dollars (\$4,500.00) from Mr. Bo Ramjit.

It is stated in the mentioned copy that "this amount is to be paid to Mr. Puche by Mr. Ramjit together with interest calculated in accordance with the Board's Practice Note No. 13. *within 14 days of receipt of this decision*".

Therefore, I would greatly appreciate if you could follow up with Mr. Ramjit regarding this overdue amount.

9. Section 24(3) of the *Occupational Health and Safety Act* (OHSA) states:

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 89 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act.

10. Section 89(6) of the *Labour Relations Act* which applies by reason of section 24(3) of the *Occupational Health and Safety Act* states:

(6) Where the trade union, council of trade unions, employer, employers' organization, person or employee, has failed to comply with any of the terms of the determination, any trade union, council of trade unions, employer, employers' organization, person or employee, affected by the determination may, after the expiration of fourteen days from the date of the release of the determination or the date provided in the determination for compliance, whichever is later, notify the Board in writing of such failure, and thereupon the Board shall file in the office of the Registrar of the Supreme Court a copy of the determination, exclusive of the reasons therefor, if any, in the prescribed form, whereupon the determination shall be entered in the same way as a judgment or order of that court and is enforceable as such.

11. We have treated Mr. Puche's letter as notification of a failure to comply with the Board's order. Pursuant to section 89(6) the Board will file a copy of the decision in the prescribed form in the office of the Registrar of the Supreme Court.

2286-89-G The Ontario Allied Construction Trades Council on behalf of Lake Ontario District Council of United Brotherhood of Carpenters and Joiners of America, Applicant v. The Electrical Power Systems Construction Association and Ontario Hydro and **Schindler Elevator Corporation**, Respondents v. International Union of Elevator Constructors, Local 50, Intervener

Adjournment - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Practice and Procedure - Union alleging employer failed to hold mark-up meeting contrary to collective agreement - Intervener union seeking adjournment to permit disposal of issue as jurisdictional dispute - A grievance which raises an issue of work assignment, even if only at the remedy stage, brings a dispute within the jurisdictional dispute provisions of the Act - Jurisdictional aspect not arising until breach of collective agreement shown - Board reluctant to embark on jurisdictional dispute where unclear applicant union will succeed in grievance, or a useful purpose be served - Board directing scheduling of grievance referral hearing on allegation that agreement breached - If breach established, Board to convene further hearing on entitlement to damages - If then apparent that applicant union's entitlement to damages is consequent on assignment of work, intervener and any other union having fourteen days to file jurisdictional dispute - If jurisdictional dispute filed, Board to defer consideration of that aspect of applicant union's claim for damages pending disposition of jurisdictional dispute

BEFORE: G. T. Surdykowski, Vice-Chair, and Board Members R. M. Sloan and K. Davies.

APPEARANCES: David A. McKee and Quintin Begg for the applicant; Robert J. Atkinson and Jerry Knight for Ontario Hydro and The Electrical Power Systems Construction Association; no one appeared on behalf of Schindler Elevator Corporation; B. Chercov, C. Murray, T. McCann and G. Brouillette for the intervener.

DECISION OF THE BOARD; October 24, 1990

1. This is a referral to the Board of a grievance in the construction industry pursuant to the provisions of section 124 of the *Labour Relations Act*.
2. The applicant grieves "that EPSCA and Ontario Hydro have failed to hold a mark-up meeting with respect to the construction of scaffolding for erection of elevators. Contract No. NK-

38RH-76220-0". The applicant asserts that the respondents have violated "articles 9.1, 9.2, 10.2 and any other relevant article" of the collective agreement between the Electrical Power Systems Construction Association (i.e. "EPSCA") and the Ontario Allied Construction Trades Council ("the EPSCA agreement"). As a remedy, the applicant seeks "that a mark-up meeting [sic] be held and that the employer [sic] compensate the union for the loss attributable to the violation of articles 9.1, 9.2 and 10.2".

3. The grievance was filed on October 18, 1989 and was referred to the Board on December 15, 1989. Although Schindler Elevator Corporation ("Schindler") was not referred to in the grievance, it was named as a respondent to the section 124 referral. (We note that, notwithstanding articles 1.3 and 1.6 of the EPSCA agreement, the applicant admits that Schindler is not bound by the EPSCA agreement. In that respect, counsel for the applicant advised the Board that Schindler had been erroneously named as a respondent in this proceeding and requested, both by letter dated and delivered October 5, 1990 and orally at the hearing on October 9, 1990, that the "style of cause" herein be amended by deleting Schindler "as a respondent" - although in the same letter counsel states that Schindler should have been named as an interested party.)

4. The grievance was scheduled to be heard by the Board on January 4, 1990. Subsequent to that date being fixed for hearing, the International Union of Elevator Constructors, Local 50 ("Local 50") wrote to the Board requesting that it be "informed of any future meetings on this matter as one of the parties involved is a signatory company of the International Union of Elevator Constructors".

5. It is evident that the "signatory company" referred to is Schindler. In response, the Registrar advised Local 50 of the January 4 hearing date. On agreement of the parties, the January 4, 1990 hearing date was adjourned and rescheduled for April 2, 1990. At the request of "counsel for the respondents", the parties, which apparently did not include Local 50, agreed to adjourn that date to May 7, 1990. The parties agreed to adjourn the May 7, 1990 date as well. Again the Board accommodated them and rescheduled the matter for hearing on October 9, 1990.

6. In the interim, by letter from counsel dated May 8, 1990, Local 50 advised the Board of its intention to intervene in this referral and put the Board and all parties on notice that it took the position that this matter is in essence a jurisdictional dispute and that it intended to request that the determination of the section 124 referral be deferred in order to permit the jurisdictional dispute to be resolved in accordance with the provisions of section 91 of the *Labour Relations Act*.

7. Local 50 did file an intervention and appeared at the hearing on October 9, 1990 at which time it argued as advertised; namely, that because the applicant's claim for damages was in a nature of a "loss of opportunity" claim, it was, at its core, a complaint concerning work assignment or, in other words, a jurisdictional dispute. Local 50 argued that it therefore directly affects its interests because the applicant would have to establish a right to work in the face of what Local 50 asserts is a lengthy history of such work being assigned to its members. Local 50 therefore requested that the section 124 proceeding be adjourned to give it an opportunity to file the appropriate complaint under section 91 of the Act (which it undertook to file) and submitted that the Board should defer consideration of the grievance herein until the complaint concerning work assignment was disposed of. Local 50 is not part of the Ontario Allied Construction Trades Council and is not bound by the EPSCA agreement. It does not seek status to participate in this proceeding except for the purpose of bringing this motion.

8. EPSCA and Ontario Hydro supported Local 50's position. (We note that no one filed an appearance at the hearing on behalf of Schindler. Although counsel for EPSCA and Ontario Hydro indicated that he nominally spoke for Schindler as well, the appearance he filed was specifi-

cally limited to being on behalf of EPSCA and Ontario Hydro. There were representatives of Schindler present in the hearing room but they made no attempt to address the Board.)

9. The applicant advised the Board that the documentation it received with respect to a "mark-up meeting" held in January 1984 with respect to the construction of eleven elevators at the Darlington nuclear power facility made no reference to the erection of scaffolding. Counsel admitted that the applicant received notice of the "mark-up meeting", that the documentation specified that the work which was the subject of the mark-up meeting was the construction of elevators, and that the applicant is well aware that the erection of scaffolding is normally a part of such construction. However, the applicant denied that its grievance herein raises a jurisdictional dispute or that it constitutes a demand for the work in question (that is, the erection of scaffolding associated with the construction of an elevator (the last of the eleven) at the Darlington nuclear facility), which has been completed. Counsel referred the Board to portions of articles 9 and 10 of the EPSCA agreement in that respect.

10. In support of the applicant's submission that this is not a case in which it would be appropriate for the Board to adjourn to permit a jurisdictional dispute complaint to be filed and determined, counsel referred the Board to *Ontario Hydro*, [1986] OLRB Rep. May 663 (the "Gray decision"); *Ontario Hydro*, Board File No. 2405-86-M, September 12, 1987, unreported, and see also *Ontario Hydro*, [1986] OLRB Rep. Oct. 1386 (both of which we will refer to as the "McCormack decisions"); and *Ontario Hydro*, [1988] OLRB Rep. Dec. 1303 (the "Freedman decision"). Counsel asked, rhetorically, why Local 50 had not already filed a complaint concerning work assignment when it had for so long been aware of the applicant's grievance. He also argued that a determination of a jurisdictional dispute would not dispose of the applicant's grievance.

11. The Gray decision deals with the question of the status of a third party which has some contractual or proprietary rights under a contract with the employer to intervene in a section 124 proceeding. Because Local 50 is not seeking to participate in the hearing of this referral on its merits, that decision is of no assistance to us.

12. The Freedman decision deals with a grievance which alleged that the respondents (there, as here, EPSCA and Ontario Hydro) had violated the EPSCA agreement (as it then was) by failing to convene a "mark-up meeting" before assigning certain pipe installation work. In that case too, it was asserted that the nub of the grievance was a work assignment dispute and that the Board should therefore decline to hear it. In that case, however, the work assignment dispute had been submitted to and determined by the Plan for Settlement of Jurisdictional Disputes in the Construction Industry. The Freedman panel concluded that what was left of the dispute related to the application and administration of the EPSCA agreement. It went on to find that Ontario Hydro had breached the collective agreement by failing to hold a "mark-up meeting" with respect to the work in question and awarded loss of opportunity damages for that breach to the grieving trade union. On the face of the Freedman decision, it appears that the jurisdictional dispute aspect of the grievance before the Freedman panel had already been determined and that the Board was satisfied in that case that there was no reason to defer consideration of the grievance before it.

13. One of the issues addressed in the McCormack decision is the very one raised by Local 50 in this proceeding. In the grievance before the McCormack panel, the applicant trade union alleged that the "employer" had violated the collective agreement binding on the parties by failing to hold a "mark-up meeting" with respect to certain work. In the grievance before the McCormack panel, the trade union was not asking that a "mark-up meeting" be held or specifically requesting that the work in question be assigned to its members. Rather, as in the grievance herein, it sought damages for the loss of opportunity resulting from the alleged breach. Faced with the motion to

defer consideration of the section 124 referral until a jurisdictional dispute could be filed and disposed of, the McCormack panel concluded that the dispute before it was essentially one regarding the interpretation of a collective agreement and had only remote jurisdictional implications. The McCormack panel concluded that the grievance before it was not really a jurisdictional dispute and, further, that it was not appropriate to defer consideration of it until a jurisdictional dispute was filed and disposed of. We note that the McCormack panel went on to find that the respondents (also EPSCA and Ontario Hydro in that case) had breached the EPSCA agreement by failing to hold a necessary "mark-up meeting". However, it declined to award the "loss of opportunity" damages sought because the trade union had failed to act promptly with respect to its grievance.

14. The provisions of the EPSCA agreement which the applicant grieves the respondents are in breach of are directed at dealing with jurisdictional claims of the trade oriented construction trade unions. There avowed purpose is to minimize the potential for jurisdictional disputes.

15. Further, where a grievance is allowed, the appropriate remedy is to put the aggrieved party as closely as possible into the position it would have been in but for the respondent's wrongful conduct. Damages for "loss of opportunity" are sometimes claimed, and are appropriate, in that respect. Such damages are often difficult to assess but a wrongdoer cannot be relieved from paying damages merely because they are difficult to assess. Nevertheless, an aggrieved party must still adduce sufficient evidence to establish, on a balance of probabilities, both the opportunity that it claims it lost and the damages it asserts it suffered as a result. In that respect, it must demonstrate a reasonable probability that it would have obtained the benefit for which it seeks compensation but for, in this case, the employer's breach of the collective agreement. A mere chance of benefit will entitle an aggrieved party to no more than nominal damages. And, as the Board and Divisional Court observed in *Radio Shack (Canada) Limited*, [1979] OLRB Rep. Dec. 1220; application for judicial review dismissed *sub nomine Re Tandy Electronics Ltd. and United Steelworkers of America et al*, (1980) 30 O.R. (2d) 29 (Div. Ct.); leave to appeal denied 30 O.R. (2d) 29n (Ontario Court of Appeal), damages will also be reduced in proportion to the contingencies to achieving the benefit claimed in the absence of the breach (see also *Canadian Pacific Forest Products Limited*, [1990] OLRB Rep. May 492; *Burlington Northern Air Freight (Canada) Ltd.*, [1987] OLRB Rep. Aug. 1064).

16. Accordingly, in this case, the applicant would have to establish that the respondents were required to and had failed to hold a proper "mark-up meeting" (which is what it has grieved) with respect to the scaffolding erection work in question and, before the Board would award the loss of opportunity damages sought, that it was entitled to be awarded that work and that there is a reasonable probability that it would have been assigned the work had the respondents not breached the collective agreement.

17. Section 91(1) of the *Labour Relations Act* provides that:

91.-(1) The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.

In the interests of labour relations stability in the construction industry, the Board has adopted a broader approach to jurisdictional disputes such that, once satisfied that it had the jurisdiction to

do so, the Board will generally hear a complaint concerning work assignment on its merits. It is not uncommon for a grievance to raise an issue which is essentially or substantially a jurisdictional dispute. When a complaint under section 91 is filed with respect to the same assignment of work which is the subject of a grievance which has been referred to it, the Board is faced with deciding how the dispute is best resolved. The purpose of section 124 is to provide an expeditious mechanism for resolving grievances in an industry in which the nature of the work and the structure of labour relations often renders ineffectual the kind of arbitration provisions typically found in collective agreements. On the other hand, section 91 is specifically designed to be the primary means by which jurisdictional disputes are to be resolved. Accordingly, although there may be circumstances in which it is not appropriate to do so, the Board will generally defer consideration of a grievance until a real jurisdictional dispute which relates to the same assignment of work has been resolved. When faced with that kind of situation, the Board has generally concluded that the grievance constitutes a demand for the work in question (*Eaman Riggs Limited*, [1978] OLRB Rep. Mar. 228; *Napev Construction Limited*, [1979] OLRB Rep. Sept. 886; *Pre-Con Company (A Division of St. Mary's Cement Limited)*, [1981] OLRB Rep. July 947; *Ontario Hydro*, [1982] OLRB Rep. March 428). It is clear that a jurisdictional dispute complaint need not be dispositive of a grievance before the Board will defer consideration of the latter. It is also far from clear that, in the circumstances of this referral, Local 50 should have filed a section 91 complaint prior to this. In any case, there is nothing which prevents Local 50 from doing so now. This would leave the Board faced with the same issue; that is, how to proceed.

18. In what appear to be similar circumstances, the McCormack panel found that *the grievance before it* had only a remote jurisdictional element to it. We agree that in the grievance herein, the question of whether the respondents, or any of them, have breached the EPSCA agreement has only remote jurisdictional implications. However, read as a whole, the McCormack decisions do not suggest that a claim for "loss of opportunity" damages said to arise from a failure to hold a "mark-up meeting" required by a collective agreement will *never* raise a substantial jurisdictional question. On the contrary, the grievance which has been referred to the Board herein demonstrates that it can. We are satisfied that because the applicant and the grievance before us must establish a right to the work in question and a reasonable probability that it would have been awarded that work before it can obtain the damages it seeks, matters in issue in the grievance go beyond questions of collective agreement interpretation and have a substantial and proximate jurisdictional element and implications. A grievance which raises an issue of work assignment, even if only at the remedy stage, brings a dispute within the ambit of section 91 of the Act.

19. However, that substantial jurisdictional aspect does not arise, for practical purposes, unless and until the applicant has established that the respondents, or any of them, have breached the EPSCA agreement. If it is unable to establish such a breach or, in the alternative, if it is unable to establish an entitlement to the damages it seeks, any determination of the jurisdictional question will be largely academic.

20. In recent years, jurisdictional disputes have consumed an ever increasing and disproportionate amount of the Board's resources. Far too often, the costs, both to the Board and (we venture to say) to the parties, of jurisdictional dispute proceedings have far exceeded the value of any real or imagined benefit derived from them.

21. Consequently, even though we are satisfied that a jurisdictional dispute is at the root of the applicant's claim for damages, and that it would be appropriate to defer consideration of that question pending the disposition of the complaint concerning work assignment which Local 50 has undertaken to file, we are not inclined to have the Board embark upon the odyssey of a jurisdic-

tional dispute when it is far from clear that there is any prospect that the applicant will succeed in its grievance herein, or that any useful purpose would otherwise be served by doing so.

22. The McCormack decision suggests a way to deal with the situation, like this one, where a grievance raises the spectre of a jurisdictional dispute which will not really crystalize, if at all, until the breach complained of is established and the question of remedy must be considered.

23. The Registrar is therefore directed to schedule this section 124 referral for hearing. The purpose of the hearing is to hear the evidence and representations of the parties with respect to all matters arising out of and incidental to the issue(s) of whether the respondents, or any of them, have breached the EPSCA agreement as alleged in the grievance.

24. If the applicant does establish a breach of the EPSCA agreement, the Board will convene a hearing to hear the evidence and representations of the parties and Local 50 (which is to receive notice of this hearing) with respect to the applicant's theory of and entitlement to damages.

25. If it becomes apparent that the applicant's entitlement to establish a right to damages is consequent upon an assignment of the work in question, Local 50 will have 14 days to file a jurisdictional dispute complaint with respect thereto. If Local 50 (or anyone else) files such a jurisdictional dispute, the Board will defer consideration of that aspect of the applicant's claim for damages herein pending the disposition of the jurisdictional dispute.

26. It would be appropriate to schedule a sufficient number of days for hearing at appropriate intervals at the outset, so that the potential for delays in the course of the proceeding is reduced.

27. In the result, Local 50's request for an adjournment of this referral is dismissed, but without prejudice to its right and ability to renew that request if the applicant succeeds in the phases of the referral set out in paragraphs 23 and 24 above.

1555-89-U United Brotherhood of Carpenters and Joiners of America, Local Union 27, Complainant v. Siding I.P.E. Limited, Respondent

Evidence - Interference in Trade Unions - Intimidation and Coercion - Practice and Procedure - Unfair Labour Practice - Complainant denied installation work after returning from vacation - Board reviewing effect of reverse onus of proof - Board reviewing relevant factors in determining existence of anti-union animus - Reinstatement ordered with compensation for damages and workplace posting

BEFORE: R. A. Furness, Vice-Chair, and Board Members W. Gibson and C. McDonald.

APPEARANCES: David Watson, Frank D'Abbondanza, Alan Wall and Stanko Barac for the complainant; Dieter Stadler, Ivan Vuksinic and Robert Rosenberg for the respondent.

DECISION OF THE BOARD; October 9, 1990

1. The complainant has filed a complaint under section 89 of the *Labour Relations Act* and

has complained that the respondent has dealt with Stanko Barac contrary to the provisions of sections 64, 66, 70, 79 and 80 of the Act. The respondent did not file a reply to the complaint. However, at the hearing the respondent denied that it had violated the Act, stated that the complaint was not well founded and that Mr. Barac had refused work that had been offered to him by the respondent.

2. The Board heard evidence from Ivan Vuksinic and Robert Rosenberg, the president and vice-president of the respondent and from the grievor Mr. Barac.

3. By virtue of section 89(5) of the Act, where there is a complaint that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to the Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer did not act contrary to the Act lies upon the employer. In a series of decisions, the Board has elaborated upon section 89(5). In *The Barrie Examiner* [1975] OLRB REP. Oct. 745, the Board held that the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. In that decision the Board stated that both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred. In *Pop Shoppe (Toronto) Limited* [1976] OLRB. Rep. June 299, the Board stated that an employer cannot engage in anti-union activity under the guise of just cause or under the guise of business reasons. The Board added that an employer best satisfies the Board in this regard by coming forth with a credible explanation for the impugned activity which is free of anti-union motive and which the evidence establishes to be the only reason for the conduct. In *De Vilbiss (Canada) Limited* [1975] OLRB Rep. Sept. 678, the Board observed at page 681, paragraph 12 as follows:

In this case the following factors are relevant in our determination of whether or not there was any anti-union motive for the discharge: 1) the existence of a pattern of anti-union activity; 2) the extent of the respondent's knowledge of the existence of union activity and of the employee's involvement in that activity; 3) the manner in which the employee was discharged; 4) the credibility of the witnesses.

4. In applying these principles to the instant complaint, the Board notes that this is not the first occasion that the respondent has appeared in proceedings before it. See *Siding I.P.E. Limited*, Board Files 1705-88-R and 2255-88-U, decision dated October 30, 1989, where the Board found that the complainant's contact, Mr. Barac, had been unlawfully dismissed and also certified the complainant herein pursuant to section 8 of the Act. The earlier decision established a pattern of the existence of anti-union activity and of Mr. Barac's involvement in that activity on behalf of the complainant. In addition Mr. Barac was denied the opportunity to work even though work was available. In assessing the credibility of the witnesses, Mr. Vuksinic appeared evasive, haughty and disdainful of the process before the Board. Mr. Rosenberg admitted that he was "not big on dates" and while he differed from Mr. Vuksinic in his less favourable assessment of Mr. Barac as an installer, his evidence did not greatly assist the Board in assessing the true circumstances which surrounded this complaint. Mr. Barac was a credible witness, and, in our view, responded to questions to the best of his ability and to the extent of his knowledge.

5. Mr. Barac and his family spent some six to seven weeks on a vacation in Europe. He commenced his vacation on June 29, 1989, and returned to Canada on August 11. The respondent was aware of Mr. Barac's vacation plans and at no time was he informed that his extended vacation would in any way jeopardize either future employment or specifically a job on his return. On August 15 he reported to the respondent's premises and asked if there was a job for him. He was told that first he had to finish the work which he had not finished before his vacation. The Board

accepts the testimony of Mr. Barac that before his vacation he completed his work as far as he could go and that he was awaiting work to be completed by bricklayers and carpenters before he could complete his own siding installation work.

6. There is a difference in the testimony between Mr. Vuksinic and Mr. Rosenberg on the one hand and Mr. Barac on the other as to the sequence of events after he finished the work which he had not finished before his vacation. The Board accepts the testimony of Mr. Barac in preference to the testimony of Mr. Vuksinic and Mr. Rosenberg regarding these events. The Board finds that Mr. Barac was offered less attractive work than other installers even though he could have been assigned to work as part of a crew with another installer who was working alone. The Board also finds that installation work was available on other houses at the time when Mr. Barac was denied further work. It is particularly difficult to understand this denial in the light of Mr. Vuksinic's assertion before the Board that when he was there Mr. Barac was a very good worker and that his work rate was twice that of an average installer. The state of mind of Mr. Vuksinic was clearly revealed during discussions about availability of work when he told Mr. Barac to "go and see your union brothers".

7. The explanations offered by the respondent for the lack of work for Mr. Barac were qualitative. The respondent did not offer any hard evidence in the form of work on hand, work in progress, number of houses and their locations. In short there was no evidence placed before the Board which supported the contention of the respondent that available work was slowing down.

8. Based on the evidence before it, the Board finds that the respondent has refused to employ Mr. Barac contrary to section 66 of the Act. The Board also finds that the respondent has sought to compel Mr. Barac from exercising his rights contrary to section 70 of the Act. The Board also finds that the respondent has refused to continue to employ Mr. Barac because he testified in a proceeding before the Board contrary to section 80 of the Act. The evidence before the Board does not support a finding that the respondent has acted contrary to sections 64 and 79 of the Act and this complaint is dismissed in so far as it relates to sections 64 and 79.

9. The Board directs that the respondent reinstate Mr. Barac to his former position with the respondent and compensate Mr. Barac for any monetary damages he may have suffered as a result of the violations of the Act by the respondent in dealing with him. The Board remains seized with respect to the quantum of damages and any matter arising out of the implementation of this decision. The respondent is directed to post the notice in the attached Appendix in a conspicuous place on its premises where all employees may have an opportunity to see it. In order that the complainant may ascertain that this notice has been posted and remains posted for the required period of sixty consecutive working days, the respondent is directed to permit a representative of the complainant all reasonable opportunities to enter its premises and verify that the notice has been and remains posted for the required period of 60 consecutive working days. Since this complaint was filed on September 25, 1989, some of the employees who were there on that date may no longer be employees of the respondent. The respondent is accordingly directed to mail copies of the attached Appendix to such persons who were employed by the respondent on September 25, 1989, and who are no longer in the employ of the respondent on the date of this decision.

2665-89-R, 2317-89-U Labourers' International Union of North America, Ontario Provincial District Council, Applicant/Complainant v. **Venasse D.J. and Construction Limited**, Respondent

Evidence - Membership Evidence - Employer entitled to ask questions with respect to union organizing campaign so long as confidentiality of employee choice on union membership not breached

BEFORE: *Inge M. Stamp*, Vice-Chair, and Board Members *W. H. Wightman* and *B. L. Armstrong*.

APPEARANCES: *Bernard Fishbein* and *Kip Ryan* for the applicant/complainant; *J. Hanson*, *Michael Venasse* and *Ken Allen* for the respondent.

DECISION OF THE BOARD; October 16, 1990

1. During the last day of hearing in these matters, the Board reserved its ruling with respect to an objection to questions put to the grievors by the respondent dealing with the organizing campaign. Both counsel requested the Board to rule on the issue before the next day of hearing.

2. The respondent takes the position that it is entitled to ask questions with respect to the union's organizing campaign both prior to the December 15 events and after, since the applicant is pleading there has been chilling of the organizing campaign as a result of the events of December 15.

3. The applicant objects to this line of questioning of the grievors and requests that an earlier question and answer be stricken from the record. The applicant takes the position that questions with respect to the organizing campaign prior to December 15 are not relevant and in any event these questions are more properly put to the organizer. There is a risk of revealing who supported the union, in violation of section 111, by asking employees questions with respect to organizing activities.

4. In the circumstances where a chilling effect is alleged because of certain events, the respondent is entitled to ask questions with respect to the organizing campaign, provided that section 111 is not breached. The objection is overruled.

5. The hearings will continue in North Bay as previously scheduled (October 29 and 30, 1990) and on additional dates set at the last hearing as follows:

February 27 and 28, 1991
March 20 and 21, 1991
April 3, 4, 16, 17 and 18.

The parties agreed that argument will be heard in Toronto.

COURT PROCEEDINGS

0542-86-R; 0035-86-U (Court File No. 272/88) **Donna Baydak** on behalf of a group of 156 employees, Applicants v. The Ontario Labour Relations Board and the United Food and Commercial Workers' Union, Local 206 and Knob Hill Farms Limited, Respondents

Board decision found at [1987] OLRB Rep. Dec. 1531 as **Knob Hill Farms Limited**; Divisional Court decision unreported June 9, 1989

Court of Appeal, Morden, Tarnopolsky, Krever, October 22, 1990

The Record was endorsed as follows: Leave to appeal refused with costs to the union.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING SEPTEMBER 1990

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0694-89-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Board of Education for the City of Windsor (Respondent)

Unit: "all continuing education instructors employed by the Respondent in Windsor, save and except administrator of continuing education, persons above the rank of administrator of continuing education and persons in bargaining units for which any trade union held bargaining rights as of June 13, 1989" (67 employees in unit) (*Having regard to the agreement of the parties*)

1635-89-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Racal-Chubb Canada Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at its facility located at 42 Shaft Road in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (25 employees in unit) (*Having regard to the agreement of the parties*)

2559-89-R: IWA-Canada (Applicant) v. Custom Windows Ltd. c.o.b. as Master Seal Windows (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at R.R. 8, Brantford, Ontario, save and except forepersons, persons above the rank of forepersons, office and sales staff, and persons regularly employed for not more than 24 hours per week" (59 employees in unit)

3054-89-R: Canadian Union of Public Employees (Applicant) v. Chatham Public Library (Respondent)

Unit: "all employees of the respondent in Chatham, save and except Deputy Chief Librarian, persons above the rank of Deputy Chief Librarian, Payroll Accounts Clerk, Administrative Secretary, Information/Reference Department Heads, Circulation/Bookmobile Department Heads, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (27 employees in unit) (*Having regard to the agreement of the parties*)

3199-89-R: United Electrical, Radio & Machine Workers of Canada (UE) (Applicant) v. Camco Inc. (Respondent)

Unit: "all office, clerical and technical employees of the respondent at or out of Barrie, save and except supervisors, persons above the rank of supervisor" (4 employees in unit) (*Having regard to the agreement of the parties*)

0173-90-R; 0174-90-R: Ironworkers District Council of Ontario (Applicant) v. Spencer J. Hawkes Inc. (Respondent)

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers' apprentices in the employ of the respondent in all sectors of the construction industry in the County of Wellington and the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic

Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (32 employees in unit)

0337-90-R: Peterborough Typographical Union, Local 248 (Applicant) v. Northumberland Publishers Ltd. c.o.b. Cobourg Star, Port Hope Evening Guide, Campbellford Herald (Respondent)

Unit #1: "all employees of the respondent regularly employed for not more than 24 hours per week at the Cobourg Daily Star in Cobourg, save and except the publisher, production manager, the editorial director, the managing editor, secretary to the publisher, the advertising manager, the controller/business manager, the circulation manager, accounting manager and students employed during the school vacation period" (26 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Applications for Certification Dismissed Without Vote*)

Unit #3: "all employees of the respondent regularly employed for not more than 24 hours per week at the Campbellford Herald in Campbellford, save and except advertising manager and managing editor and students employed during the school vacation period" (2 employees in unit) (*Having regard to the agreement of the parties*)

0692-90-R: Laurentian University Faculty Association (Applicant) v. Thornloe University (Respondent)

Unit: "all full-time academic staff of the respondent in Sudbury, save and except the provost and persons above that rank" (5 employees in unit) (*Having regard to the agreement of the parties*)

0705-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Raftis Carpets Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (18 employees in unit)

0738-90-R: Labourers' International Union of North America, Local 527 (Applicant) v. 160288 Canada Inc. c.o.b. as A. Zaconi Paving & Construction (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

0832-90-R: International Union of Bricklayers & Allied Craftsmen, Local 5 (Applicant) v. Base Construction Inc., BCI Contracting Ltd., AB Tile Ltd. (Respondents) v. Labourers' International Union of North America, Local 1059 (Intervener)

Unit: "all journeymen and apprentice marble, tile, terrazzo, cement masons, resilient floor layers and their helpers in the employ of the respondents in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice marble, tile, terrazzo, cement masons, resilient floor layers and their helpers in the employ of the respondents in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

0833-90-R: International Union of Bricklayers & Allied Craftsmen, Local 5 (Applicant) v. Base Construction Inc., BCI Contracting Ltd., AB Tile Ltd. (Respondents)

Unit: "all journeymen and apprentice bricklayers in the employ of the respondents in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice bricklayers in the employ of the respondents in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (38 employees in unit)

0855-90-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Base Construction Inc., BCI Contracting Ltd., AB Tile Ltd. (Respondents) v. International Union of Bricklayers & Allied Craftsmen, Local 5 (Intervener)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (18 employees in unit)

0958-90-R: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen and The International Union of Bricklayers & Allied Craftsmen, Local 7 (Applicant) v. Bectar Corporation (Respondent)

Unit: "all marble, tile and terrazzo mechanics, cement masons and resilient floor layers in the employ of the respondents in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all marble, tile and terrazzo mechanics , cement masons and resilient floor layers in the employ of the respondents in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

0969-90-R: International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. Acheson Electric Inc. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of the respondent in all sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1023-90-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Branch 133, Legion Village Inc. (Respondent)

Unit #1: "all employees of the respondent in Cobourg, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office, and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (23 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in Cobourg regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff" (10 employees in unit) (*Having regard to the agreement of the parties*)

1025-90-R: International Association of Machinists & Aerospace Workers (Applicant) v. D.D.M. Plastics Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Town of Tillsonburg, save and except forepersons, persons

above the rank of foreperson, engineers, office and sales staff" (268 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1045-90-R: United Steelworkers of America (Applicant) v. M. Zagerman & Co. Ltd. (Respondent)

Unit: "all employees of the respondent in the Township of Russell, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period and persons covered by the subsisting provincial collective agreement between The Ontario Erectors' Association and the International Association of Bridge, Structural & Ornamental Ironworkers" (41 employees in unit) (*Having regard to the agreement of the parties*)

1060-90-R: Bakery Confectionery & Tobacco Workers' International Union, Local 322 (Applicant) v. Brandon Bakery Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, route drivers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (57 employees in unit) (*Having regard to the agreement of the parties*)

1065-90-R: Ontario Public Service Employees Union (Applicant) v. Visiting Homemakers Association (Respondent)

Unit #1: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and persons for whom any trade union held bargaining rights as of July 17, 1990" (27 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, and persons for whom any trade union held bargaining rights as of July 17, 1990" (2 employees in unit) (*Having regard to the agreement of the parties*)

1080-90-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Scugog (Respondent)

Unit: "all employees of the respondent in the Township of Scugog, save and except assistant to the clerk-administrator, persons above the rank of assistant to the clerk-administrator, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and persons in for whom any trade union held bargaining rights as of July 19, 1990" (3 employees in unit) (*Having regard to the agreement of the parties*)

1113-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Ventra Group Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in its Ventra manufacturing Division in Chatham, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and employees in bargaining units for which any trade union held bargaining rights as of July 23, 1990" (20 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1116-90-R: International Union of Operating Engineers, Local 793 (Applicant) v. Harnden & King Construction, A Division of George Wimpey Canada Ltd. (Respondent)

Unit: "all employees of the respondent in all sectors of the construction industry in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1132-90-R: Teamsters, Local No. 419 (Applicant) v. Clarke's Produce Canada Ltd. (Respondent)

Unit: "all employees of the respondent in Mississauga, save and except foremen, those above the rank of foreman, office and sales staff" (30 employees in unit) (*Having regard to the agreement of the parties*)

1147-90-R: Public Service Alliance of Canada (Applicant) v. Moose Band Development Corporation (Respondent)

Unit: "all employees of Moose Band Development Corporation at Moose Factory General Hospital, Ontario, save and except the manager, persons above the rank of manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (14 employees in unit) (*Having regard to the agreement of the parties*)

1152-90-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Walfoods Ltd. (Respondent)

Unit: "all employees of the respondent in the Township of Bruce and Kincardine, save and except supervisor, and persons above the rank of supervisor" (15 employees in unit) (*Having regard to the agreement of the parties*)

1159-90-R: Service Employees Union, Local 210 (Applicant) v. Women's House of Bruce County (Respondent)

Unit: "all employees of the respondent in Kincardine, Ontario, save and except supervisors, persons above the rank of supervisor, students employed during the school vacation period, office and clerical employees and persons regularly employed for not more than 24 hours per week" (6 employees in unit) (*Having regard to the agreement of the parties*)

1162-90-R: International Union of Operating Engineers, Local 793 (Applicant) v. Gordon Trailer Sales & Rentals Ltd. (1989) (Respondent)

Unit: "all employees of the respondent in the Township of Paipoonge, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (12 employees in unit) (*Having regard to the agreement of the parties*)

1165-90-R: International Brotherhood of Painters & Allied Trades, Local 205 (Applicant) v. 676767 Ontario Inc. c.o.b. as Bay City Sandblasting (Respondent)

Unit: "all employees of the respondent in the City of Hamilton, save and except office, clerical and sales staff, persons not employed for more than 24 hours per week, supervisors and those above the rank of supervisor" (6 employees in unit)

1200-90-R: International Brotherhood of Electrical Workers, Local 303 (Applicant) v. W. & W. Electric Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

1225-90-R: Labourers' International Union of North America, Local 1059 (Applicant) v. C & P Lafontaine Excavating Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the

employ of the respondent in all sectors of the construction industry the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1234-90-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Gjehub Mechanical Contractors Ltd. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1242-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Machine Finish Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1243-90-R: Ontario Public Service Employees Union (Applicant) v. Fortune Society of Canada Inc. (Respondent)

Unit #1: "all employees of the respondent at Stanford House, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (4 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent at Stanford House in the Municipality of Metropolitan Toronto employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (3 employees in unit) (*Having regard to the agreement of the parties*)

1244-90-R: Graphic Communications International Union, Local 588 (Applicant) v. Trans Continental Printing Inc. (Respondent)

Unit: "all employees of the respondent in the City of Cornwall, save and except non-working foremen, persons above the rank of non-working foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (132 employees in unit) (*Having regard to the agreement of the parties*)

1284-90-R: Teamsters, Local No. 419 (Applicant) v. SEB Canada Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff" (6 employees in unit) (*Having regard to the agreement of the parties*)

1303-90-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Wendy's Restaurants of Canada Inc. Store #365 (Respondent)

Unit #1: "all employees of the respondent at 1411 Ouellette Avenue, Windsor, save and except Assistant Manager, persons above the rank of Assistant Manager, office and clerical staff and employees regularly employed for not more than 24 hours per week" (5 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent at 1411 Ouellette Avenue, Windsor employed for not more than 24 hours per week, save and except Assistant Manager, persons above the rank of Assistant Manager and office and clerical staff" (32 employees in unit) (*Having regard to the agreement of the parties*)

1306-90-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. In-Line Process Fabrication Ltd. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1312-90-R: Niagara Health Care & Service Workers Union, Local 302 Affiliated with the Christian Labour Association of Canada (Applicant) v. Caduceus Living Centres (Fort Erie) Ltd. Partnership (Respondent)

Unit #1: "all employees of the respondent in the Town of Fort Erie, save and except department managers, persons above the rank of department manager, director of nursing, office, and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (18 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in the Town of Fort Erie regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except department managers, persons above the rank of department manager, director of nursing and office and clerical staff" (21 employees in unit) (*Having regard to the agreement of the parties*)

Unit #3: "all office and clerical employees of the respondent in the Town of Fort Erie, save and except supervisors and persons above the rank of supervisor" (2 employees in unit) (*Having regard to the agreement of the parties*)

1315-90-R: Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees Local No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Beatrice Foods Inc., Aylmer Dairy Division (Respondent)

Unit: "all employees of the respondent at Aylmer, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen, those above the rank of foreman, office, and sales staff" (2 employees in unit) (*Having regard to the agreement of the parties*)

1337-90-R: Labourers' International Union of North America, Local 527 (Applicant) v. Brenning Construction (1986) Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent and all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit)

1353-90-R: Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corporation No. 43 (Respondent)

Unit: "all employees of the respondent engaged in cleaning and maintenance working at 5 Vicora Linkway, Don Mills including resident superintendents, save and except Property Manager, office and sales staff" (3 employees in unit) (*Having regard to the agreement of the parties*)

1360-90-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Holland Mechanical Contractors Ltd. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all sectors of the construction industry in the the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1364-90-R: Ontario Public Service Employees Union (Applicant) v. New Beginnings, Homes for the Developmentally Handicapped, Metropolitan Toronto (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and office staff" (18 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1377-90-R: Graphic Communications International Union, Local 500M (Applicant) v. Boltron Tidman Corporation (Respondent)

Unit: "all employees of the respondent in Metropolitan Toronto, save and except sales staff, office staff, non-working foremen and those above the rank of non-working foreman" (11 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1741-89-R: L'Association des enseignantes et des enseignants suppléants d'Ottawa-Carleton élémentaire sépar 2i (Applicant) v. La Section catholique du Conseil Scolaire de langue française d'Ottawa-Carleton (Respondent)

Unit: "tous les enseignant(e)s suppléant(e)s, qualifié(es) et non-qualifié(e)s 2¢ l'emploi de l'intimée dans la municipalit 2i d'Ottawa-Carleton" (154 employees in unit) (*Having regard to the agreement of the parties*)

Nombre de personnes dont le nom est inscrit sur la liste revisee des votant	154
Nombre de personnes qui ont vote	21
Nombre de bulletins de vote pour le requerant	20
Nombre de bulletins de vote contre le requerant	1

0409-90-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Sudbury Board of Education (Respondent)

Unit: "all office, clerical and technical employees of the respondent in the Regional Municipality of Sudbury, save and except Translators, Communications Officer, Accountants, forepersons, chief custodians, supervisors of maintenance, operations and transportation, persons above the rank of supervisor and persons for whom any trade union held bargaining rights as of May 14, 1990" (209 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	209
Number of persons who cast ballots	82
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	177
Number of segregated ballots cast by persons whose names appear on voters' list	5

Number of ballots marked in favour of applicant	122
Number of ballots marked against applicant	55
Ballots segregated and not counted	5

0592-90-R: Teamsters Local Union 938 (Applicant) v. Seven-Up Canada Inc. and Compac Beverages Ltd. (Respondent)

Unit: "all employees of the respondent at its Pepsi Seven-Up Toronto Division and its Compac Beverages Ltd. subsidiary in Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical and Tel-sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (407 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	407
Number of persons who cast ballots	335
Number of ballots marked in favour of applicant	199
Number of ballots marked against applicant	136

0891-90-R: International Union of Operating Engineers, Local 796 (Applicant) v. Marriott Corporation of Canada Ltd. (Respondent)

Unit: "all employees of the respondent at Monfort Hospital in Ottawa who are regularly employed for not more than 24 hours per week, save and except foremen and foreladies, persons above the rank of foreman and forelady, students employed during the school vacation period and persons for whom any trade union held bargaining rights as of June 23, 1990" (17 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	17
Number of persons who cast ballots	10
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	0

Applications for Certification Dismissed Without Vote

0337-90-R: Peterborough Typographical Union, Local 248 (Applicant) v. Northumberland Publishers Ltd. c.o.b. Cobourg Star, Port Hope Evening Guide, Campbellford Herald (Respondent) Units #1 & #3 (see *Bargaining Agents Certified Without Vote*) Unit #2 (*Dismissed*) (3 employees in unit)

1343-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. American Healthcare Manufacturing (Canada) Ltd. (Respondent) v. Group of Employees (Objectors) (20 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0023-90-R: International Union of Operating Engineers, Local 793 (Applicant) v. Miller Waste Systems, a division of Miller Paving Ltd. (Respondent)

Unit: "all employees of the respondent in the Town of Markham and the Town of Whitchurch - Stouffville, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff" (116 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	116
Number of persons who cast ballots	82
Number of ballots marked in favour of applicant	30
Number of ballots marked against applicant	49
Ballots segregated and not counted	3

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0353-90-R: Canadian Union of Public Employees (Applicant) v. Dale Home (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at London, save and except the residential manager, persons above the rank of residential manager, office staff, and students employed during the school vacation period" (24 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	21
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	15

Applications for Certification Withdrawn

0231-82-R: Labourers' International Union of North America, Local 527 (Applicant) v. V.N.M. Construction & Formwork Ltd. (Respondent)

2368-88-R: Association of Municipal Employees (Applicant) v. City of Gloucester (Respondent)

3239-89-R: United Food & Commercial Workers International Union (Applicant) v. Reebok Canada, a Division of Avrecan International Inc. (Respondent) v. Group of Employees (Objectors)

0051-90-R: United Brotherhood of Carpenters & Joiners of America, Local 249 (Applicant) v. St. Lawrence Drywall and H. & R. Contracting (Respondents)

0572-90-R: IWA - Canada, Local 1-2995 (Applicant) v. Rexwood Products Ltd. and Nova Wood (Respondents)

1145-90-R: Ontario Public Service Employees Union (Applicant) v. Parry Sound & District General Hospital (Respondent)

1229-90-R: Office & Professional Employees International Union (Applicant) v. District of Thunder Bay Homes for the Aged (Respondent)

1282-90-R: United Steelworkers of America (Applicant) v. Niagara Fasteners Inc. (Respondent)

1374-90-R: Energy & Chemical Workers Union (Applicant) v. Furmanite Canada Ltd. (Respondent)

1608-90-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Penn-Co. Construction Ltd. (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0706-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Bonnell Commercial Carpet Inc. and Raftis Carpets Ltd. (Respondents) (*Withdrawn*)

0743-90-R: Office & Professional Employees International Union, Local 386 (Applicant) v. Sturgeon Timber Ltd. and Canadian Pacific Forest Products Ltd. (Respondents) (*Withdrawn*)

1191-90-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. 806966 Ontario Inc. c.o.b. as A-1 Taxi, and 727825 Ontario Ltd. c.o.b. as Eastway Taxi (Respondents) (*Granted*)

1328-90-R: International Brotherhood of Painters & Allied Trades, Local 1824 (Applicant) v. Caledonia Painting & Decorating, Caledonian Hills Painting & Decorating Ltd., Scot-Can Ltd. & Andrew Gibson Bryce c.o.b. as A.G.B. Painting & Decorating and A.G.B. Decorating Systems (Respondents) (*Granted*)

SALE OF A BUSINESS

0571-90-R: IWA - Canada, Local 1-2995 (Applicant) v. Rexwood Products Ltd. and Nova Wood (Respondents) (*Withdrawn*)

0742-90-R: Office & Professional Employees International Union, Local 386 (Applicant) v. Sturgeon Timber Ltd. and Canadian Pacific Forest Products Ltd. (Respondents) (*Withdrawn*)

0924-90-R: Canadian Union of Public Employees (Applicant) v. Laidlaw Waste Systems Ltd. (Commercial) (Respondent) (*Dismissed*)

1328-90-R: International Brotherhood of Painters & Allied Trades, Local 1824 (Applicant) v. Caledonia Painting & Decorating, Caledonian Hills Painting & Decorating Ltd., Scot-Can Ltd. & Andrew Gibson Bryce c.o.b. as A.G.B. Painting & Decorating and A.G.B. Decorating Systems (Respondents) (*Granted*)

CROWN TRANSFER ACT

1096-88-R; 1097-88-R: Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario as represented by the Ministry of Natural Resources and Walsh Nursery (Respondents) (*Granted*)

1333-88-R: Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario as represented by the Ministry of Natural Resources and Jon Moller (Respondents) (*Granted*)

1335-88-R; 1336-88-R: Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario as represented by the Ministry of Natural Resources and Triple G Contracting (Respondents) (*Granted*)

2161-88-R: Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario as represented by the Ministry of Natural Resources and UMA Engineering Ltd. (Respondents) (*Granted*)

2163-88-R: Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario as represented by the Ministry of Natural Resources and Irvin Walsh and Ralph Ogilvie (Respondents) (*Granted*)

2164-88-R: Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario as represented by the Ministry of Government Services and Norwon Electric Sault Co. Ltd. (Respondents) (*Granted*)

2330-88-R: Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario as represented by the Ministry of Government Services and DND Enterprises (Respondents) (*Granted*)

2334-88-R: Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario as represented by the Ministry of Transportation and Lovas & Patterson Inc. (Respondents) (*Granted*)

2342-88-R; 2343-88-R: Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario as represented by the Ministry of Transportation and John Ross Anderson (Respondents) (*Granted*)

2931-88-R: Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario as represented by the Ministry of Natural Resources and Belleville Tree Service (Ken Kennington) (Respondents) (*Granted*)

0385-89-R: Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario as represented by the Ministry of Natural Resources and Board of Governors of Algonquin College of Applied Arts & Technology (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2616-89-R: Yves Bergeron (Applicant) v. Sheet Metal Workers' International Association, Local 47 (Respondent) v. Rainbow Neon & Plastic Signs Ltd. (Intervener)

Unit: "all employees of the intervener in the City of Gloucester, save and except foremen, persons above the rank of foreman, commercial Artist, and office, clerical and sales staff" (6 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	5

2644-89-R: Jose Manuel Cabral (Applicant) v. C.A.W., Local 444 Marine Division (Respondent) v. 670154 Ontario Ltd. c.o.b. as Jose Cabral Fisheries (Intervener)

Unit: "all employees of the Company engaged in commercial fishing on Lake Erie, save and except those above the rank of boat captain" (9 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	5
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	5

0002-90-R; 3284-89-R: Antonio Bertucci (Applicant) v. Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Respondent) (6 employees in unit) (*Dismissed*)

0040-90-R: Michael Parker (Applicant) v. Labourers' International Union of North America, Labourers' International Union of North America, Ontario Provincial District Council and their affiliated Local Unions 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081 and 1089 (Respondents) v. D-K Construction Ltd. (Intervener)

Unit: "all construction labourers, including masons' or bricklayers' tenders, plasterers and plasterers' apprentices and all employees engaged in cement finishing, waterproofing or restoration work in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers, including masons' or bricklayers' tenders, plasterers and plasterers' apprentices and all employees engaged in cement finishing, waterproofing or restoration work in the residential sector of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), for whom the respondents have bargaining rights with the employer" (4 employees in unit) (*Dismissed*)

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	4
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	1

0152-90-R: Stan Hall, Roxane MacKay, Herbert Bell (Applicants) v. Teamsters, Local 938 (Respondent)

Unit: "all employees of the employer at Whitby, Ontario working under contract for the Town of Whitby, employed as full-time line run bus driver, excluding persons classified as manager, dispatcher, school bus, part-time and charter drivers" (22 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	22
Number of persons who cast ballots	20
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	19

0217-90-R: Jerry Hartman (Applicant) v. Teamsters Local No. 141, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. Moffatt & Powell Ltd. (Intervener)

Unit: "all employees of Moffatt & Powell Limited at Exeter, save and except assistant manager, persons above the rank of assistant manager, office and clerical staff, salesmen, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (4 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	4
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	4

0267-90-R: Alvena Desserre (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) v. Kowality Motor Inn (Intervener)

Unit: "all employees of the employer, save and except manager and persons above the rank of manager" (7 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots marked in favour of respondent	5
Number of ballots marked against respondent	2

0308-90-R: Dolores Bryson (Applicant) v. Teamsters Local No. 880, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. Moffatt & Powell Ltd. (Intervener)

Unit: "all employees of Moffatt & Powell Limited at Watford, save and except assistant manager, persons above the rank of assistant manager, office and clerical staff, salesmen, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (5 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	5
Number of persons who cast ballots	5
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	5

0343-90-R: Ms. Layne Petry & Ms. Marilyn Nightingale et al (Applicants) v. Service Employees' International Union (Clerical), Local 204 (Respondent) v. North York General Hospital (Intervener) (125 employees in unit) (*Dismissed*)

0491-90-R: Darrell MacKinnon and Rick Foss (Applicants) v. Ottawa Newspaper Guild (Respondent) v. The Ottawa Citizen, A Division of Southam Inc. (Intervener)

Unit: "all Computer Information Services Department employees, save and except the Manager of Computer Information Services, Liaison Officer, Data Centre Manager, Technical Services Supervisor and one confidential secretary to the first named officer" (10 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	10
Number of names of persons on revised voters' list	10
Number of persons who cast ballots	8
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	7

0627-90-R: Cameron Ross and Donald Jacklin (Applicants) v. International Union of Operating Engineers, Local 793 (Respondent) v. Donegan's Haulage Ltd. (Intervener)

Unit #1: "all employees of the intervener in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and

Elgin, excluding the I.C.I. Sector, save and except non-working foremen, persons above the rank of non-working foreman" (4 employees in unit) (*Dismissed*)

Unit #2: all employees of the intervener working at or out of Listowel, save and except non-working foremen, persons above the rank of non-working foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the summer vacation period" (30 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	30
Number of persons who cast ballots	27
Number of ballots marked in favour of respondent	8
Number of ballots marked against respondent	19

0686-90-R: Vern Andreas (Applicant) v. Teamsters, Local 879 (Respondent) v. Altype Metal Stampings Ltd. (Intervener)

Unit: "all employees of Altype Metal Stampings Limited in Stoney Creek, Ontario, save and except supervisors, persons above the rank of supervisor, clerical, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (27 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	27
Number of persons who cast ballots	22
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	22

0823-90-R: District of Thunder Bay Homes for the Aged (Applicant) v. Office & Professional Employees International Union (Respondent)

Unit: "all office and clerical employees of the District of Thunder Bay Homes for the Aged in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor and secretary to the Administrator" (4 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	3

1130-90-R: Tracy Delmo (Applicant) v. United Steel Workers of America (Respondent) v. Guillevin International Inc. (Intervener) v. Group of Employees (Objectors) (13 employees in unit) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0787-90-U: Northfield Metal Products Ltd. (Applicant) v. Glass, Molders, Pottery, Plastics & Allied Workers International Union, AFL:CIO:CLC: (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

0432-90-U; 0433-90-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 673 (Applicants) v. Bourque Consumer Electronics Service Inc. and Mr. Pierre Bourque (Respondents) (*Granted*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1542-89-U: Shirley Ann Boydell (Complainant) v. United Steelworkers of America, Local 4153 and Amcan Castings Ltd. (Respondents) (*Withdrawn*)

1756-89-U: United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. Racal-Chubb Canada Inc. (Respondent) (*Withdrawn*)

2422-89-U: United Food & Commercial Workers International Union, Local 175 (AFL:CIO:CLC:) (Complainant) v. Susan Shoe Industries Ltd. (c.o.b. as Cougar Shoes), Liduino Silveira, and Gene Paszt (Respondents) (*Withdrawn*)

3001-89-U: Bertrand F. Bennett (Complainant) v. United Brewers Warehousing Workers Provincial Board (Respondent) v. Brewers Retail Inc. and Mr. Jack Connolly (Intervenors) (*Dismissed*)

3035-89-U: International Union of Operating Engineers, Local 793 (Complainant) v. Cliffside Utility Contractors Ltd. (Respondent) (*Withdrawn*)

3085-89-U: Gordon Knowles, Joan Lepage, Sue Lamonde and Don Wade (Complainants) v. United Food & Commercial Workers International Union, Local 175 (Respondent) v. Steinberg Inc. (Intervener) (*Dismissed*)

3147-89-U: Thomas McGill (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local 1316 London, Ont. (Respondent) (*Withdrawn*)

0154-90-U: Service Employees' Union, Local 210 affiliated with Service Employees' International Union, AFL:CIO:CLC: (Complainant) v. The Salvation Army Grace Hospital, Windsor, Ontario (Respondent) (*Withdrawn*)

0227-90-U: United Steelworkers of America and United Steelworkers of America, Locals 1005, 8782, 8460, 5328, 3561, 3749, 3767 and 3208 (Applicants) v. Stelco Inc. Hilton Works; Stelco Inc. Lake Erie Works; Stelco Inc. Stelwire Continuous Rod Processing Plant; Stelco Inc. Stelwire - Parkdale Works; Stelco Inc. Stelwire - Frost Works; Stelco Inc. Stelco Fastener & Forging Company Brantford Works; Stelco Inc. Stelco Fastener & Forging Company - Swansea Works and Fastener Distribution Centre; Stelco Inc. Stelco Fastener & Forging Company Gananoque Works (Respondents) (*Withdrawn*)

0402-90-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Complainant) v. Hully Gully London Ltd. (Respondent) (*Withdrawn*)

0412-90-U: Guilherme Da Costa (Complainant) v. Canadian Union of Public Employees, Local 1011 and Halton Board of Education (Respondents) (*Dismissed*)

0569-90-U: Donata Bruno (Complainant) v. Toronto Western Hospital (Respondent) (*Withdrawn*)

0629-90-U: Service Employees Union, Local 210 (Complainant) v. Township of Amabel (Respondent) (*Withdrawn*)

0644-90-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Complainant) v. Hully Gully London Ltd. and Patrick J. Melady (Respondents) (*Withdrawn*)

0693-90-U: International Leather Goods, Plastics & Novelty Workers' Union, Local 8 (Complainant) v. Weldo Plastics Ltd. (Respondent) (*Withdrawn*)

0767-90-U: Alphonso Anthony Gabbidon (Complainant) v. Glass, Molders, Pottery, Plastics & Allied Workers International Union (Respondent) (*Withdrawn*)

0844-90-U: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 183 (Complainants) v. Ontario Hydro (Respondent) (*Withdrawn*)

0854-90-U: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Complainant) v. Rockett Lumber & Building Supplies Ltd. (Respondent) (*Withdrawn*)

0889-90-U: Maria Wysocki (Complainant) v. Ontario Public Service Staff Union (Respondent) (*Withdrawn*)

0917-90-U: London & District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Complainant) v. Meadowpark Nursing Home (Respondent) (*Withdrawn*)

0918-90-U: Harold H. Bell (Complainant) v. Amalgamated Transit Union, Local 1602 (Respondent) (*Withdrawn*)

0940-90-U: Subhash C. Sharma (Complainant) v. Spar Aerospace Ltd. (Respondent) (*Dismissed*)

0955-90-U: Ontario Nurses' Association (Complainant) v. The Corporation of the County of Hastings (Respondent) (*Dismissed*)

0959-90-U: Mrs. Jadranka Daniele (Complainant) v. Mr. Phillip Paul (Respondent) (*Withdrawn*)

0967-90-U: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800 (Complainant) v. Bonik Inc. (Respondent) (*Granted*)

0974-90-U: Ontario District Council of the International Ladies Garment Workers' Union (Complainant) v. Omega Scarves, a Division of 745723 Ontario Inc. (Respondent) (*Withdrawn*)

1009-90-U: Jaime Mota (Complainant) v. C.A.W. Union, Local 252 (Respondent) (*Withdrawn*)

1034-90-U: Daniel M. Leduc (Complainant) v. Edna Stillar; Co-Chairman and Paul Labelle; Union Representative (Respondents) (*Withdrawn*)

1069-90-U: Hotel Employees & Restaurant Employees Union, Local 442 (Complainant) v. St. Catharines Golf & Country Club Ltd. (Respondent) (*Withdrawn*)

1076-90-U: Labourers' International Union of North America, Local 183 (Complainant) v. International Union of Operating Engineers, Local 793 (Respondent) (*Withdrawn*)

1082-90-U; 1083-90-U: Guilherme da Costa (Complainant) v. Halton B. of Education and Canadian Union of Public Employees, Local 1011 (Respondents) (*Withdrawn*)

1091-90-U; 1142-90-U: Glass, Molders, Pottery, Plastics & Allied Workers International Union, through its Local 64 (Complainant) v. Aluminum Reduction Company (Respondent) (*Withdrawn*)

1103-90-U: United Food & Commercial Workers International Union (Complainant) v. Reebok Canada a Division of Avrecan International Inc. (Respondent) (*Withdrawn*)

1118-90-U: Monica Christina Villenuve (Complainant) v. Service Employees' International Union, Local 528 (Respondent) (*Withdrawn*)

1179-90-U: Canadian Union of Public Employees, Local 229 (Complainant) v. Queen's University at Kingston, Ontario (Respondent) (*Withdrawn*)

1227-90-U: Canadian Union of Public Employees, Local 1302 (Complainant) v. Queen's University at Kingston, Ontario (Respondent) (*Withdrawn*)

1254-90-U: Brett Pereira (Complainant) v. Roxul Insulations (Respondent) (*Withdrawn*)

1272-90-U: Wanda Dutton (Complainant) v. Service Employees Union, Local 663 (Respondent) (*Withdrawn*)

1274-90-U: Canadian Union of Public Employees, Local 254 (Complainant) v. Queen's University at Kingston, Ontario (Respondent) (*Withdrawn*)

1288-90-U: International Union of Operating Engineers, Local 793 (Complainant) v. Labourers' International Union of North America, Local 183 (Respondent) (*Withdrawn*)

1291-90-U: Ethier, Aurele Leo (Complainant) v. City of Burlington, C.U.P.E., Local 44B and C.U.P.E., Local 2723 (Respondents) (*Withdrawn*)

1297-90-U: Santokh Singh (Complainant) v. Sealy Furniture Canada (Respondent) (*Dismissed*)

1310-90-U: United Food & Commercial Workers International Union, Local 175/633 (Complainant) v. Giant Timber Industries Ltd. (Respondent) (*Withdrawn*)

1355-90-U: Gloria Knott (Complainant) v. Ontario Jockey Club (Respondent) (*Dismissed*)

1390-90-U: Service Employees Union, Local 210 (Complainant) v. Pincrest Manor Nursing Home (Respondent) (*Withdrawn*)

1475-90-U: Gary M. Brown (Complainant) v. Canadian Airlines International (Respondent) (*Dismissed*)

1496-90-U: International Brotherhood of Electrical Workers, Local 303 (Complainant) v. W. & W. Electric Inc. c.o.b. as Albern Electric (Respondent) (*Withdrawn*)

1580-90-U: Lorenzo Reid (Complainant) v. Indalex (Joe M. Tomasik) (Respondent) (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1473-88-M: Canadian Union of Public Employees and its Local 1680 (Applicant) v. Peterborough County Board of Education (Respondent) (*Granted*)

3181-88-M: Southern Ontario Newspaper Guild, Local 87 (Applicant) v. Metroland Printing, Publishing & Distributing, a division of Harlequin Enterprises Ltd. (Respondent) (*Granted*)

2338-89-M: Canadian Union of Public Employees, Local 3170 (Applicant) v. Prescott-Russell Roman Catholic Separate School Board (Respondent) (*Dismissed*)

2969-89-M: Ontario Secondary School Teachers' Federation (Applicant) v. The Carleton Board of Education (Respondent) (*Granted*)

3210-89-M: Notre-Dame Hospital (Applicant) v. Ontario Nurses' Association (Respondent) (*Withdrawn*)

0043-90-M: Canadian Union of Public Employees and its Local 2179 (Applicant) v. Board of Management of the District of Thunder Bay Home for the Aged (Respondent) (*Withdrawn*)

0614-90-M: County of Haliburton (Applicant) v. C.U.P.E., Local 1960 (Respondent) (*Granted*)

0971-90-M: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 444 (formerly Great Lakes Fishermen & Allied Workers Union) (Applicants) v. 670154 Ontario Ltd. (Jose Cabral Fisheries) (Respondent) (*Granted*)

1084-90-M: Canadian Union of Public Employees, Local 3263 (Applicant) v. Windsor Coalition for Development (Chateau Park Lodge) (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0748-90-OH: Doug McFadden (Complainant) v. Blenkhorn & Sawle Ltd. (Respondent) (*Granted*)

0878-90-OH: Terry MacDougall (Complainant) v. Stelco Inc. (Hilton Works) (Respondent) (*Withdrawn*)

1022-90-OH: Paul Montroy (Complainant) v. ABB Combustion Engineering Systems Combustion Engineering Canada Inc. (Respondent) (*Dismissed*)

1143-90-OH: Tim V. Pauley (Complainant) v. Village Pool & Spa (Respondent) (*Granted*)

1261-90-OH: Maureen Reid, Chris Palmateer, Patricia Snyder, Christina Boreham and Babyla Patell (Complainants) v. Harvey Albert (Respondent) (*Withdrawn*)

COLLEGES COLLECTIVE BARGAINING ACT

1290-90-U: Ontario Public Service Employees Union, Local 653 (Applicant) v. Northern College of Applied Arts & Technology (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

1011-88-G: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Robert Laframboise Mechanical Ltd. (Respondent) (*Dismissed*)

0040-89-G: Sheet Metal Workers' International Association, Local 562 (Applicant) v. Steelfabco Inc. (Respondent) (*Granted*)

2343-89-G: Labourers' International Union of North America, Local 527 (Applicant) v. V & M Construction and Form Work Ltd. (Respondent) (*Withdrawn*)

2725-89-G: The Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. J. G. Masonry Ltd. (Respondent) (*Granted*)

2833-89-G; 0941-90-G: The Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Maca Masonry Inc. (Respondent) (*Granted*)

0051-90-R; 0052-90-G: United Brotherhood of Carpenters & Joiners of America, Local 249 (Applicant) v. St. Lawrence Drywall and H. & R. Contracting (Respondents) (*Withdrawn*)

0316-90-G; 1239-90-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. 688193 Ontario Inc. c.o.b. as Top Roofing & Sheet Metal (Respondent) (*Granted*)

0579-90-G: Labourers' International Union of North America, Ontario Provincial District Council and its affiliated Local Unions (Applicants) v. The Utility Contractors' Association of Ontario Inc. and Par-Tex Engineering & Contracting Co. Ltd. (Respondents) (*Withdrawn*)

0617-90-G: Labourers' International Union of North America, Local 837 and Labourers' International Union of North America, Ontario Provincial District Council (Applicants) v. P. J. Daly Contracting Ltd. (Respondent) (*Withdrawn*)

0841-90-G: Christian Labour Association of Canada (Applicant) v. Stars Electric Ltd. (Respondent) (*Granted*)

0975-90-G: Labourers' International Union of North America, Local 493 (Applicant) v. JDS Investment Ltd. (Respondent) (*Withdrawn*)

1016-90-G; 1017-90-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Durwes Contracting Ltd. (Respondent) (*Granted*)

1039-90-G: International Association of Heat & Frost Insulators & Asbestos Workers, Local 95 (Applicant) v. Western Industrial Services Ltd. (Respondent) (*Granted*)

1040-90-G: International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Applicant) v. EnerSystem Insulation Ltd. (Respondent) (*Withdrawn*)

1041-90-G: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. J.D.S. Investments Ltd. (Respondent) (*Withdrawn*)

1054-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Dominion Paving Ltd. (Respondent) (*Granted*)

1063-90-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada on its own behalf and on behalf of its Local 463 (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Withdrawn*)

1164-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Sandercock Construction (1976) Ltd. (Respondent) (*Granted*)

1189-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Rabito Sewer & Watermain Contractors Ltd. (Respondent) (*Withdrawn*)

1190-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Can-Pave, Division of 713059 Ontario Ltd. (Respondent) (*Withdrawn*)

1213-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Bay Concrete & Drain Inc. (Respondent) (*Withdrawn*)

1214-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. G.L. Trenching Ltd. & G.L. Drain Inc. (Respondent) (*Granted*)

1237-90-G; 1238-90-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Huffman Bros., Welding Inc. (Respondent) (*Withdrawn*)

1263-90-G: Labourers' International Union of North America, Local 1059 (Applicant) v. J-AAR Excavating Ltd. (Respondent) (*Withdrawn*)

1268-90-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 765 (Applicant) v. T. A. Andre & Sons (Ontario) Ltd. (Respondent) (*Withdrawn*)

1298-90-G; 1299-90-G: Millwrights District Council of Ontario on its own behalf and on behalf of its Local 1007 (Applicant) v. Canal Contractors, A Division of ULS Int. Inc. (Respondent) (*Granted*)

1327-90-G: International Brotherhood of Painters & Allied Trades, Local 1824 (Applicant) v. Andrew Gibson Bryce c.o.b. as A.G.B. Painting & Decorating and A.G.B. Decorating Systems (Respondents) (*Granted*)

1345-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. 720419 Ontario Ltd. o/a L.P.S. Excavating & Grading (Respondent) (*Withdrawn*)

1357-90-G: Labourers' International Union of North America, Local 493 (Applicant) v. TESC Contracting Ltd. (Respondent) (*Withdrawn*)

1376-90-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Teperman & Sons Inc. (Respondent) (*Withdrawn*)

1378-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. E & P Sodding & Grading Ltd. (Respondent) (*Withdrawn*)

1380-90-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Buckeye Steel Erectors (Respondent) (*Withdrawn*)

1381-90-G: Labourers' International Union of North America, Local 597 (Applicant) v. Limen Masonry Ltd. (Respondent) (*Granted*)

1384-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Ottawa Crane Rental Services Ltd. (Respondent) (*Granted*)

1385-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Dufresne Piling Company (1987) Ltd. (Respondent) (*Granted*)

1386-90-G: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Rally Painting Ltd. (Respondent) (*Withdrawn*)

1397-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. C & M Carpentry (Respondent) (*Granted*)

1400-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Sir Forming Ltd. (Respondent) (*Withdrawn*)

1402-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Joe Bancheri Carpentry (Respondent) (*Withdrawn*)

1429-90-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Colles Contracting (Respondent) (*Granted*)

1436-90-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Amberland Electric Inc. (Respondent) (*Granted*)

1454-90-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Applicant) v. Air Conditioning 2000 Ltd. (Respondent) (*Granted*)

1455-90-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Applicant) v. Governors Mechanical Inc. (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1450-89-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. N. A. Carpenters Ltd. (Respondent) (*Dismissed*)

*Ontario Labour Relations Board,
400 University Avenue,
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ONTARIO LABOUR RELATIONS BOARD REPORTS

November 1990



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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1990] OLRB REP. NOVEMBER

EDITOR: PERCIVAL S.C. TOOP

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.



Typeset, Printed and Bound by Union Labour in Ontario

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BEFORE: *Robert Herman*, Vice-Chair, and Board Members *R. M. Sloan* and *K. Davies*.

APPEARANCES: *Harry A. Lavoie, Gerald (Gerry) Ellis, Lynn Ronco and Wendy Little* for the applicant; *R. W. Kitchen and John Lepore* for the respondent; *Donald White, Christine Kosmack, Tracy Shaw and William Cadoret* for the objectors.

DECISION OF THE BOARD; October 30, 1990

1. At the last day of hearing, the Board made a number of oral rulings, including that the petition was involuntary and that Christine Kosmack was a managerial employee within the meaning of section 1(3)(b) of the *Labour Relations Act*, and therefore was not an employee for purposes of the Act. The Board reserved its decision with respect to the issue of whether the membership card of Nancy Witherden could be relied upon by the applicant union. If her card is found to be a reliable membership card, then the applicant would be certified without a vote with respect to the part-time bargaining unit, subject to the resolution of the Board's inquiry into various non-pay allegations and the reliability of the Form 9 declaration. If however, her card is rejected by the Board, then a vote would be directed in the part-time unit, since without her card the applicant has less than 55 per cent membership support in that bargaining unit, even though the petition was found to be involuntary and no weight was given to the signatures on it.

2. The blank form of the Application for Membership, (or membership card) submitted in support of the application is as follows:

APPLICATION FOR MEMBERSHIP
in the
HOTEL AND RESTAURANT EMPLOYEES' AND BARTENDERS' INTERNATIONAL UNION
affiliated with
AFL-CIO CANADIAN LABOR CONGRESS

NAME
(Please Print Plainly)

ADDRESS TEL.

Employed at Occupation
do hereby make application to become a member of

HOTEL AND RESTAURANT EMPLOYEES' AND BARTENDERS' INTERNATIONAL UNION
Local No.



If accepted I agree not to violate the provisions of the constitution and ritual of the International Union, and agree to conform to the Constitution and by-laws now in force or hereafter amended, all rules and regulations of our International Union or Local Union to which I am designated.

I agree, as a member of or, hereby applying for membership in, do designate and authorize said organization separately and/or collectively through any of its affiliated locals, agents or representatives to represent me, and as such representative for me and in my behalf to negotiate and conclude agreements as to hours of labour, wages and other employment conditions in accordance with the by-laws of said organization.

I further agree to allow my employer to deduct from my earnings Union Dues assessed by the designated Local of the Hotel and Restaurant Employees' and Bartenders' International Union such deduction to be made on or before the 7th of each month.

Date Signed.

Were you ever a member of this International? Yes No.

On Account of Initiation Fee \$

Initiation Fee \$ I confirm payment of \$

Received by Member's Signature

3. The problem with respect to Ms. Witherden's card arises with respect to whether a dollar was paid in support of her application. In the first space on the card for a monetary amount to be noted, where it reads "On Account of Initiation Fee \$ ____" (just below the paragraphs which describe the Application for Membership), the sum of \$1.00 is filled in. In the part of the card immediately below that, where it reads "Initiation Fee \$ ____", a \$1.00 is similarly recorded, and below that, where the card reads "Received by", the signature of the collector has been recorded. To the right of that the card reads "I confirm payment of \$ ____." In the majority's view (Board member Davies dissenting on this point), the word "Nil" has been printed in this space. Immediately below this the signature of Ms. Witherden is recorded. In short, although the dollar payment is indicated in the first two applicable spaces on the card, the word "Nil" is written where confirmation of payment is to be recorded, just above where the employee signs confirming the payment.

4. The applicant asked to be allowed to lead *viva voce* evidence to establish that Ms. Witherden had in fact paid a dollar in support of her application for membership. The employer objected and the Board heard their submissions on this point.

5. In numerous prior decisions the Board has ruled that it will not allow *viva voce* evidence to be led in order to establish either of the two substantive aspects of membership: whether the individual has in fact applied for membership, and whether at least one dollar has been paid in support of that application. For example, in *P.R.C. Chemical Corporation of Canada Ltd.* [1980] OLRB Rep. May 749, the Board wrote as follows:

12. The requirement that a minimum payment of one dollar be made and be shown in writing on union membership evidence accepted by the Board has been the subject of considerable comment in previous Board decisions. That requirement has traditionally been imposed as a safety device to enhance the reliability of documents that are, of necessity, hearsay evidence. In *Leons Furniture Limited*, [1976] OLRB Rep. Feb. 8 at page 9 the Board expressed the rationale for the Board's membership evidence requirements as follows:

"...This notion of financial sacrifice seems to have been discussed first in *RCA Victor Ltd.*, 53 CLLC ¶17,067 (OLRB) wherein it was expressed that a money payment was necessary to constitute confirmatory evidence of the desire of the payer to become a member of the trade union. In other words, the Board was saying that it wants to be assured that the employees who are alleged to have become members have directed their minds and given careful thought to the implications of such a step. Moreover, the Board has time and time again emphasized that it must exact and protect stringent standards with respect to membership evidence in that other parties to a certification proceeding do not have the opportunity to examine the membership evidence nor in the usual case do parties have the opportunity to cross-examine the witnesses with respect to membership evidence. (See *Zehr's Markets Ltd.*, [1972] OLRB Rep. June 635.)

5. These requirements of the Board are clear and well known and we are loathe to deviate from them. Despite the apparent arbitrary nature of such rules they fulfill three important functions - cautionary, evidentiary, and channelling.

The *RCA Victor* case outlines the cautionary nature of the requirement and *Zehr's Markets Ltd.* is representative of the evidentiary perspective. The third function - that of telling employees and trade unions how membership in a trade union can be obtained for the purposes of the Act - is important to both the Board and the parties. Clear and unequivocal rules in this important area provide the kind of predictability and certainty that is required for organizational purposes and minimizes the amount of "litigation" before the Board. Thus the certification process is expedited and the secrecy as to union membership provided under section [111] is accomplished. In other words, the more the Board deviates from its accepted practice the more parties

will be encouraged to litigate the question of membership evidence with all the attendant costs of such disputes."

• • •

15. These principles apply with particular force in the interpretation of section 1(1)[l] of the Act. That provision, defining "member of a trade union" for the purposes of the Act as including a person who has applied for membership and has paid an initiation fee or dues of not less than one dollar was enacted following the decision of the Supreme Court of Canada in *Metropolitan Life Insurance Co.* (1970), 11 D.L.R. (3d) 336. In that case the Court ruled that by not assessing the membership status of employees according to all of the terms of the union's constitution and looking instead only to whether the employees had made a written application for membership and paid not less than one dollar as an initiation fee, according to its longstanding practice, the Board was asking itself the wrong question. The law as stated by the Court effectively struck down the Board's requirement that generally a union must file written evidence of an application for membership and the payment of one dollar as proof of an employee's union membership in an application for certification. Standing alone the *Metropolitan Life Co.* case threatened the introduction into the Board's proceedings of technical and legalistic considerations that could bring the certification process to a standstill. The Legislature, therefore, amended the Act by enacting section 1(1)[l], (*The Labour Relations Amendment Act 1970*, S.O. 1970, c.3, s. 1). There can be little doubt that by so doing the Legislature intended to restore the status quo. By writing the provisions of that section into the Act, the Legislature effectively confirmed the Board's prior practice and made the twin conditions of an application for membership and the payment of at least one dollar substantive requirements to establish union membership in an application for certification. That view has been consistently reflected in the Board's practice.

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18. There are numerous cases where the Board has rejected documentary membership evidence which did not indicate that the employees who had joined the applicant union had paid one dollar. In *Wheatley Manufacturing Limited*, [1964] OLRB Rep. Dec. 457, an issue arose as to whether the membership evidence submitted by the applicant union conformed to the requirements of the Board. In particular, there was some question as to whether there had been any initiation fee payments made by the employees to the union. The Board in summarizing its membership evidence requirements stated at page 457:

"The Board has certain well established requirements as to evidence of membership submitted in support of applications for certification. These requirements include ... that applications for membership be made in writing, signed by the person said to be a member of the applicant; that each person said to be a member of the applicant pay to the applicant, on his own behalf, an amount of at least \$1.00 in respect of the prescribed initiation fee or monthly dues of the applicant; that this money payment be confirmed by a written receipt signed by the person who collected the money and counter-signed by the person who paid the money, and that this evidence be supported by a declaration in Form 9 with respect to the collection of the money. By section 50(1) [now 73(1)] of the Board's Rules of Procedure evidence as to representation must be in writing and by section 50(2) [now 73(2)] of the Rules, the Board is prohibited from accepting oral evidence of membership except to identify and substantiate the written evidence.

In the instant case the only written evidence of membership consists of the "memorandum of articles of association" referred to above. By that document the signatories declare themselves to be associated in a joint and common venture and agreed to be and to become members of the applicant. There was no written evidence or any money payment by any person alleged to be a member of the applicant...it is clear that this evidence does not meet the standards which the Board has consistently required to be met and accordingly this application must be dismissed."

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26. The foregoing cases reflect a consistent thread in the Board's treatment of docu-

mentary evidence of union membership. The Board has found that oral evidence is admissible if it goes to supportive information such as the date when the membership evidence was obtained or the counter-signature of a collector. By virtue of section [73] of the Board's Rules and the policy reasons that underlie the rule, the Board has not permitted *viva voce* evidence to establish the two substantive conditions of membership as defined by the Act, namely, the application for membership and the payment of the one dollar initiation fee.

And see also *Pebra Peterborough Inc.* [1988] OLRB Rep. Jan.76; *Maple Leaf Mills Limited* [1984] OLRB Rep. Oct. 1474.

6. The membership application contains inconsistent information as to whether a dollar has been paid. In two places, a “\$1.00” is filled in indicating payment, and the inconsistent statement “NIL” appears in the third space. Evidence as to, for example, how or why the word “NIL” appears where it does would only be led to attempt to satisfy the Board that the dollar had in fact been paid. Any other evidence the applicant might wish to lead would also only be relevant to the issue of whether the dollar was paid, which is the issue before us. But this issue, whether the dollar has been paid, is one of the substantive aspects of membership. It is one of the few matters that *viva voce* evidence is not admissible with respect thereto. Accordingly, the request of the applicant to call such evidence is hereby denied. We will consider only the card itself.

7. The dollar is filled in in two of the applicable spaces, but an inconsistent statement (the word “Nil”) appears in the third space. In the majority’s view (Board Member Davies dissenting), we are not satisfied that the \$1.00 has been paid. The word “NIL” in the space where the applicant for membership confirms that payment was made, leaves the Board uncertain as to whether the dollar has been paid. “Nil” casts sufficient doubt upon the effect of the \$1.00 showing in the other spaces that we are not prepared to conclude that the dollar has actually been paid. Accordingly, Ms. Witherden’s card will not be counted. Therefore, at best, a vote will be directed in the part-time bargaining unit, subject to the resolution of the outstanding issues (as noted above).

8. At the last hearing day, the Board set further days for hearing as follows: November 20, 21 and 22, 1990, in Peterborough. This matter will continue on those days.

2790-89-R; 2791-89-R United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463, Applicant v. **Andreynolds Company Limited** and Bill Bailey of Belleville Limited, Respondents

Construction Industry - Related Employer - Sale of a Business - Union having actual knowledge that companies under common control and direction at least several years before filing application - Union having actual knowledge of loss of job opportunities and that work covered by its collective agreement was being performed by a related employer not bound to that agreement - Union delay causing respondents prejudice and affecting right of unrepresented employees to seek own bargaining agent or remain unrepresented - Application dismissed

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *W. Gibson* and *R. R. Montague*.

APPEARANCES: A. Ahee and B. Christie for the applicant; D. A. Whyte and G. Reynolds for the respondents.

DECISION OF THE BOARD; November 11, 1990

1. In Board File 2790-89-R, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 ("U.A.") seeks a declaration pursuant to section 63 of the *Labour Relations Act* ("the Act") that there has been a sale of all or part of the business from Andreynolds Company Limited ("Andreynolds") to Bill Bailey of Belleville Limited ("Bill Bailey") and that Bill Bailey is thus the successor employer. At the conclusion of the hearing counsel for the U.A. made no submissions in respect of this application. Having regard to the evidence before us the application in Board File 2790-89-R is dismissed.

2. In Board File 2791-89-R, the U.A. has applied to the Board for a declaration that the two corporate respondents are one employer within the meaning of section 1(4) of the Act. In that application the corporate respondents concede that the statutory conditions precedent to the Board's jurisdiction are present. They admit that the corporate entities carry on associated or related activities under common direction or control but submit that we should exercise our discretion and not make the single employer declaration by reason of the U.A.'s delay in filing this application.

3. Andreynolds was incorporated in 1968. Since its incorporation it has carried on business as a mechanical contractor in the construction industry in Belleville, Trenton and the surrounding area. Since its incorporation, Andreynolds has been bound to successive collective agreements with the U.A (Local 320 and its successor Local 463), the International Brotherhood of Electrical Workers Local 115 and the Sheet Metal Workers International Association, Local 269. The majority of its business is in the ICI sector of the construction industry.

4. In or around 1972 - 1973, representatives of Andreynolds acquired an interest in the already existing Bill Bailey enterprise. Witnesses called on behalf of the corporate respondents candidly admitted that one of the reasons Andreynolds acquired an interest in Bill Bailey was to enable it to bid competitively on "non-union" jobs. Bill Bailey is not, and in the past has not been, bound to any collective agreement with any trade union. Since at least 1974, Bill Bailey has also carried on business as a mechanical contractor in the ICI sector of the construction industry in Belleville, Trenton and surrounding areas. It has either directly employed or engaged by way of sub-contract journeymen or apprentice electricians, sheet metal workers, and plumbers.

5. Since 1977 Bill Bailey and Andreynolds have been wholly under common direction or control. Since that time (and indeed before then) the two companies have followed separate but parallel paths, each performing as mechanical contractors in the construction industry. Andreynolds performed its work in the unionized segment of the construction industry. Bill Bailey carried on business in the non-unionized segment of the construction industry as a "non-union" contractor.

6. Each company has three separate divisions - an electrical division, sheet metal division and a "mechanical" or "plumbing" division. Throughout the hearing the witnesses used the terms "mechanical" and "plumbing" divisions interchangeably although it is commonly understood that "mechanical" construction industry work encompasses more than just "plumbing work" and generally includes, *inter alia* sheet metal work. For ease of reference we will refer to the "mechanical" division as the "plumbing" division and refer to the business of both Andreynolds and Bill Bailey

as mechanical contracting. The managers of each of the three divisions are common to both companies. Over the years the electrical and sheet metal divisions of each of the two companies has generated the highest volume of work for the companies.

7. The two companies have operated side by side since approximately 1972. Since 1979 the companies have operated from the same premises. A large sign along the top of the building has the names of both companies on it. Below the name of the companies the words "Electrical, Plumbing, Sheet Metal and Air Conditioning" appear without any apparent delineation. There is thus no indication that one company performed exclusively in the "electrical" area while another only does "plumbing" work. Within the physical environment of the office there is also no indication that certain offices are exclusive to either company. Neither is there any indication that management and staff in that office are exclusive to either company.

8. The companies each have separate telephone listings, separate bank accounts, separate payroll records and other office records. Office and managerial staff are generally paid by the holding company which owns both Andreynolds and Bill Bailey. The two corporate respondents are each "charged" a fee proportionate to the amount of work managerial staff perform on behalf of each company.

9. Each of the corporate respondents has its own employees. All of the Andreynolds construction employees are members of the applicant union or another construction trade union and are engaged through the union hiring halls. None of the Bill Bailey employees are members of the applicant union or any other union.

10. The sources of work for the two companies are basically the same. Contracts are obtained either through requests to tender from general contractors, requests to tender from private institutions or Government bodies, advertisements in the Daily Commercial News or local newspapers, or the Construction Association of Belleville. It is not uncommon for both Andreynolds and Bill Bailey to receive a request to tender on particular projects. The companies do not however "compete" against each other and would not both tender on the same project.

11. In determining which of the two companies will tender on any particular project, management of the two companies first determine who their competition for that particular project is or is likely to be. Over the past several years, the majority of the plumbing work in the Belleville area has been awarded to non-union contractors. When originally incorporated in 1968 Andreynolds was one of three major unionized mechanical contractors in the Belleville area. Since that time however one of the other unionized mechanical contractors has gone out of business while the other mechanical contractor is performing more maintenance and service work. As a result Andreynolds finds that it is unable to compete against its non-union competitors for a number of jobs because of its higher wage rates. In those instances Bill Bailey tenders on the project. On other occasions the general contractor will require the mechanical contractor to use unionized labour in which case Andreynolds tenders on the project.

12. If Andreynolds is successful in obtaining the contract it employs union members to perform the work.

13. If Bill Bailey is successful in obtaining the contract it attempts to employ its own direct hire employees to do the work. These employees are not members of the union. If Bill Bailey is unable to man the project with its own employees, it will subcontract all or a portion of the work to another non-union contractor. If Bill Bailey is unable to use its own employees or engage a non-union subcontractor, it will subcontract the work to Andreynolds and use Andreynolds' unionized

employees to perform the work. Those employees would be paid by Andreynolds in accordance with the terms of the U.A. agreement to which Andreynolds is bound.

14. Over the years Bill Bailey has subcontracted approximately fifty percent of the work it has obtained to Andreynolds. There is no evidence to suggest that contracts obtained by Andreynolds were ever subcontracted to Bill Bailey or that Bill Bailey employees ever performed work for Andreynolds or on Andreynolds projects. Thus, although the non-unionized contractor (Bill Bailey) subcontracts work it obtains back to the unionized contractor (Andreynolds), the reverse is not true.

15. We accept the evidence of the witnesses that neither the employees nor the union would necessarily know whether a project upon which Andreynolds employees were working was a Bill Bailey contract or an Andreynolds contract. Although it is true that employees were told to charge supplies to either Bill Bailey or Andreynolds and would thus have some indication as to which company held the contract, we accept that for the most part Andreynolds employees were concerned only with whom their employer was and from whom they received their paycheques. Similarly, we accept that the U.A. does not and need not necessarily involve itself in determining who holds the mechanical contract on any particular job so long as U.A. members are working on that job. In those circumstances, as far the U.A. is concerned it would mean that the contractor is a union contractor hiring union members.

16. As indicated the two companies have carried on parallel construction operations. Tendered into evidence was a list of projects for which each company held the contract and a summary of work in the ICI sector in terms of dollar value and percentage of total business for each company. That documentary evidence may be summarized as follows (deleting invoices of \$1,000.00 or less).

Andreynolds ICI Projects for Period Ending June 30th.

Year	Electrical	(%)	Plumbing	(%)	Sheet Metal	(%)
1980	11,673.02	(100)	0.00	(0.0)	0.00	(0.0)
1981	473,688.52	(64.6)	61,705.95	(8.4)	198,124.99	(27.0)
1982	460,905.44	(74.2)	67,377.78	(10.8)	93,022.34	(15.0)
1983	1,232,389.81	(86.4)	8,174.60	(0.6)	185,865.18	(13.0)
1984	439,542.52	(66.3)	106,400.16	(14.8)	171,040.24	(23.9)
1985	168,165.94	(66.6)	25,124.77	(9.9)	59,336.99	(23.5)
1986	56,540.58	(38.8)	8,590.00	(5.9)	80,688.94	(55.3)
1987	64,190.73	(18.8)	37,707.84	(11.0)	240,265.14	(70.2)
1988	40,158.21	(57.5)	10,783.61	(15.4)	18,894.39	(27.1)
1989	508,436.47	(98.1)	9,652.90	(1.9)	0.00	(00.0)

Bill Bailey ICI Projects for Period Ending June 30th.

<i>Year</i>	<i>Electrical</i>	<i>(%)</i>	<i>Plumbing</i>	<i>(%)</i>	<i>Sheet Metal</i>	<i>(%)</i>
1980	172,099.23	(93.5)	0.00	(0.0)	11,967.24	(6.5)
1981	220,050.23	(46.4)	173,522.22	(36.6)	80,784.27	(17.0)
1982	44,848.07	(12.0)	116,686.72	(31.2)	212,513.75	(56.8)
1983	332,392.16	(48.3)	158,928.46	(23.1)	197,205.68	(28.6)
1984	389,139.15	(61.5)	116,628.66	(18.4)	126,958.84	(20.1)
1985	335,565.87	(30.2)	244,816.37	(22.0)	532,545.99	(47.8)
1986	301,060.97	(30.0)	355,694.83	(35.5)	346,378.21	(34.5)
1987	366,952.28	(30.7)	321,259.16	(26.8)	508,533.12	(42.5)
1988	443,433.45	(35.7)	87,510.99	(7.0)	712,875.90	(57.3)
1989	957,446.94	(42.8)	564,102.30	(25.2)	715,482.12	(32.0)

17. This evidence discloses that while the overall fortunes of Bill Bailey have remained fairly constant with steady growth from year to year, Andreynolds has fared less well. In particular, there has been a gradual decrease in the overall dollar volume of Andreynolds business particularly since 1985. A spurt of growth in business in 1989 is wholly due to its electrical work. From the perspective of the plumbing work performed by both companies however, since 1985 there has been a gradual decline in plumbing work at Andreynolds although there has been a steady (with the exception of 1987) growth at Bill Bailey.

18. The evidence also discloses however that for the past ten years Bill Bailey has had a constant presence in ICI plumbing work in the Belleville/Trenton area. In relation to its overall operations, the plumbing work at Bill Bailey has generally represented less than one third of the total and generally less than either the sheet metal or electrical work. The evidence does not support the assertion by the U.A. and its witnesses that Bill Bailey was primarily a "sheet metal shop" which only recently ventured into the plumbing business.

19. Notwithstanding the fairly substantial amount of plumbing work acquired by Bill Bailey, that company has only rarely over the past ten years directly employed any apprentice or journeymen plumbers to work in the field. Much of its work appears to have been sublet either to other non-union contractors or to Andreynolds. For the period from 1980 to the Fall of 1989, with the exception of Scott Maracle who commenced his apprenticeship as a plumber with Bill Bailey in July 1986, the company did not directly employ any journeyman or apprentice plumbers.

20. Prior to 1980 Bill Bailey did have plumbers in its direct employ for various periods of time. These included Jim Salt and Keith Shangraw.

21. In the Fall of 1989 Bill Bailey hired approximately three plumbers to work on its projects at the Warkworth Penitentiary and Frankford Water Plant. The union asserts that this is the clear change in the operations of Bill Bailey which alerted the union to the erosion of its bargaining rights. Upon being confronted with this knowledge it promptly filed this application.

22. The employment history of Scott Maracle is significant to any determination whether the union knew of circumstances which should have caused it to file a section 1(4) application at some significantly earlier point in time. We therefore find it convenient to set out that employment history and the place of the parties within that history.

23. Prior to his registration as an apprentice, Scott Maracle worked for Bill Bailey. His father Laverne Maracle is a journeyman plumber and a member of the U.A. who has worked "steady" for Andreynolds (except for the usual periods of layoffs typical in the construction industry).

try) for the past twenty years. In that time he has not worked for any other mechanical contractors. He has the longest service of any plumber employed by Andreynolds.

24. Scott Maracle worked as a summer student for Bill Bailey during the summer months of 1981, 1982 and 1983. While so employed he did, what he termed as "basically labour type jobs". These he described as carrying pipe, cleaning up jobs, etc. After graduating from High School, Mr. Maracle attended Loyalist College with the view to obtaining employment in the electronics field. Upon graduation from college however there were few opportunities, and in May 1985 Mr. Maracle returned to work at Bill Bailey. Again he performed primarily "labouring" jobs.

25. For a period of time Mr. Maracle attempted to become a registered apprentice electrician. He applied to the IBEW but to no avail. Having some familiarity with the plumbing trade he determined to become an apprentice plumber instead. He therefore approached Len Webster the Plumbing Manager at Bill Bailey and Andreynolds. Mr. Webster advised him to contact the U.A. In May 1986, Mr. Maracle spoke to Les Weegent, the local U.A. business agent but was advised that the U.A. was not accepting apprentices that year. When Mr. Maracle advised Mr. Webster of this fact it was suggested he could start his apprenticeship with Bill Bailey instead. The appropriate documentation was drawn up and in June 1986 Scott Maracle entered into a contract of apprenticeship with Bill Bailey.

26. After he entered his contract of apprenticeship, Scott Maracle continued to "still do a lot of running around". He also however started to do "small, commercial work such as one and two-day jobs" such as roughing in washrooms in new stores. Towards the end of his employment with Bill Bailey, and as he progressed in his trade, Scott Maracle began to perform more sophisticated plumbing work including the laying of pipe and installation of fixtures. He estimated he began to lay pipe "probably in 1985". Throughout this time Mr. Maracle worked exclusively with his father, Laverne Maracle.

27. At the instigation of his father, Scott Maracle went to see Brian Christie who was at that time the Training Coordinator of the U.A. in an attempt to join the U.A. Mr. Christie testified that he had been approached by Laverne Maracle to accept his son into the union. During the discussions with Mr. Laverne Maracle, Mr. Christie became aware that Scott Maracle was a registered apprentice working for Bill Bailey.

28. Scott Maracle met Brian Christie when he filed his application to join the U.A in 1987. Thereafter, sometime in early 1988, Scott Maracle was required to complete an aptitude test. He again spoke to Mr. Christie. He showed Mr. Christie his contract of apprenticeship with Bill Bailey. Mr. Christie recalled that he spoke to Scott Maracle about the type of work he was doing and how he was learning his trade as plumber. He testified that Scott Maracle was vague about the details and attributed this fact to the notion that Scott Maracle did not want to implicate his father.

29. Scott Maracle also testified that he discussed with Mr. Christie the type of work Bill Bailey was performing although he stated "we never really talked in detail". He believed he discussed with Mr. Christie "who run Bill Bailey" and who he, Scott Maracle, worked for. Mr. Maracle advised Mr. Christie that it was Len Webster. Finally, in cross-examination Scott Maracle was asked and answered the following question:

Question: "Did he [Mr. Christie] seem to know about Bill Bailey and that it was a non-union mechanical contractor in Belleville?"

Answer: "Yes".

30. Mr. Christie acknowledged that at that point he was aware "of at least some tie in" between Andreynolds and Bill Bailey. Mr. Christie however considered Scott Maracle's employment as an apprentice with Bill Bailey to be a "side deal which one of our members had cooked up with a contractor". He saw the situation as one in which Mr. Laverne Maracle, a U.A. member and long-service plumber employed by Andreynolds was desirous of having his son get into the plumbing trade and was able to get the contractor to accommodate his wishes. Mr. Christie considered the opportunity to have Scott Maracle join the union as a method of "cleaning up" the situation without involving the U.A. in lengthy and costly litigation such as a single employer application under section 1(4). He thought that if Scott Maracle joined the union the respondent companies would no longer have any non-union plumbers in their employ.

31. In July 1988, Scott Maracle was admitted into the membership of the U.A. At that time he ceased his employment with Bill Bailey. At the time he became a member of the U.A. he was given the appropriate credit for the years of apprenticeship served with Bill Bailey. He was taken in as either a second or third year apprentice. He was referred by the U.A. to Andreynolds. Mr. Maracle was taken off the Bill Bailey payroll and was switched to the payroll of Andreynolds.

32. Counsel for the respondent companies asserts that the companies have carried on their activities in an open and public manner. The respondents submit that this application should be dismissed because the union knew, or alternatively should have known, of the relationship between Andreynolds and Bill Bailey. The applicant's failure to act promptly or with due diligence forecloses it from obtaining the remedy which it now seeks. In support counsel relied upon *Zaph Construction Ltd.*, [1977] OLRB Rep. Nov. 741, *Ellwall and Sons Construction Limited*, [1978] OLRB Rep. June 535, *Farquhar Construction Ltd.*, [1978] OLRB Rep. Oct. 914, *Harold R. Stark Limited*, [1978] OLRB Rep. Oct. 945, *Evans-Kennedy Construction Limited*, [1979] OLRB Rep. May 388, *Acto Builders (Eastern) Limited*, [1979] OLRB Rep. June 465, *Ferro Structural Steel (Toronto) Limited*, [1981] OLRB Rep. May. 523, *Capricorn Acoustics & Drywall Ltd.*, [1986] OLRB Rep. March 308, *Krest Masonry Contracting Limited*, [1988] OLRB Rep. August 813, *Gottcon Contractors Limited*, [1989] OLRB Rep. July 757, *Steve's Sheet Metal Company*, [1985] OLRB Rep. Dec. 1804.

33. We find it unnecessary to detail the jurisprudence to which counsel referred. The Board's refusal to exercise its discretion in favour of a section 1(4) applicant by reason of the applicant's delay is well established. Whether there has been such delay, and what effect it has on the exercise of the Board's discretion depends on the facts and circumstances of each case and the knowledge of the trade union.

34. The past jurisprudence of the Board does address the issue in terms of whether the union knew or ought reasonably to have known. The Board's past jurisprudence has also imposed a "due diligence" test on trade unions and their representatives. That test is designed to be a realistic and not unduly onerous standard which balances the competing interest of the parties. Trade union representatives should not have to become private investigators spying to obtain information within the control of the employer and which can, with little difficulty, be hidden or camouflaged by an employer with whom it has a collective bargaining relationship. As counsel for the U.A. accurately pointed out, the Legislature itself has recognized the difficulty a union has in determining "relatedness" and "loss of job opportunities" through use of corporate restructuring by enacting section 1(5). We do not think that the trade union should be obliged to file a single employer application on the basis of hearsay, rumour or innuendo.

35. Neither on the other hand, neither should trade union business agents be allowed to simply ignore clear evidence of an interrelationship between corporate entities (thereby inducing

the employer to rely upon the fact that the trade union is ignoring that evidence) and simply claim "we didn't know" the obvious. The trade union cannot be "wilfully blind" (see *The Great Atlantic and Pacific Co. Ltd.* [1981] OLRB Rep. March 285; *Subito Contracting (Drywall & Painting) Co. Ltd.*, [1981] OLRB Rep. Oct. 1494 and the cases referred to therein.) For this reason, in certain circumstances actual knowledge may be imputed to the union by reason of such surrounding facts as the prominent display of signs at company premises, work projects, or on company vehicles, the open and regular intermingling of unionized and non-unionized employees, etc.

36. The issue highlighted by the facts and circumstances before us is *what* is it the union must have knowledge of so that it can act with "due diligence"? Counsel for the union submits that the union must have actual knowledge of actual work opportunities lost by reason of the relationship between two entities. In the circumstances of this case it is asserted that the U.A. must have actual knowledge not only that Bill Bailey was a mechanical contractor which did plumbing work, but also that such plumbing work was *actually* performed in a manner which would be a violation of the U.A. collective agreement if Bill Bailey was bound to that collective agreement i.e. through non-union employees or a sub-contract to a non-union contractor?

37. On the other hand, counsel for the respondents asserts that the U.A. must have knowledge only of the fact that there is some relationship between two entities each of which performs the type of work covered by the collective agreement between an applicant union and one of the corporate entities before the union is required to act with "due diligence". More specifically, in the circumstances of this case he argues that, once the union had knowledge of the fact that Bill Bailey was a non-union mechanical contractor and that plumbing work covered by the agreement was done *by or through* that mechanical contractor the union should have acted. He submits that the U.A.'s failure to act then should result in the Board now exercising its discretion to decline to grant the section 1(4) declaration.

38. We have determined that it is unnecessary in the circumstances of this case to determine which of these two tests is more appropriate. Regardless of the test employed we find on the evidence before us that the union had actual knowledge of the fact that Bill Bailey and Andreynolds were under common direction or control, that Bill Bailey was a mechanical contractor which did plumbing work, and that the manner in which Bill Bailey carried out that plumbing work was beyond the terms of the collective agreement to which Bill Bailey would become bound if the U.A. had moved expeditiously in filing this application.

39. The evidence before us establishes that at the absolute latest the union had actual knowledge that Bill Bailey was a mechanical contractor which did plumbing work by late 1987. This application was filed in February, 1990.

40. Richard Thomson, a retired pipefitter and plumber who has been a member of the U.A. for approximately forty years testified. Mr. Thomson was the President of U.A. Local 320 for fifteen years. Local 320 of the U.A. merged with Local 463 in or about 1984 - 1985. After he ceased to be on the executive of Local 320 but prior to the merger with Local 463 Mr. Thomson acted as "doorman" at union meetings. This involved meting people at the door and checking their union cards. As such Mr. Thomson attended most, if not all, union meetings. Mr. Thomson was aware that both Bill Bailey and Andreynolds carried on plumbing, heating and sheet metal work although he was not personally familiar with the connection between the two companies and had never worked for either of the two companies. Mr. Thomson recalled that Bill Bailey and Andreynolds were discussed "on different occasions" at meetings of the membership "anywhere from five to eight years ago". Mr. Thomson testified the matter was raised two or three times. When asked to recollect the nature of those discussions Mr. Thomson testified that "... I remember they said

we did not have funds to carry on with it at the time". When counsel asked what he meant by funds to "carry on with what?" Mr. Thomson responded "with a hearing like this ... what you are having here today.". Mr. Thomson further testified that he thought that the two companies were of concern to the U.A. stating "I think they were. I imagine so. That's why our business agent at the time was supposed to look into it. How far he got I don't know."

41. The evidence of other tradesmen and the other witnesses called by the respondents also support the respondents' assertion that it was commonly known that Andreynolds was the unionized mechanical contractor while Bill Bailey was the non-unionized mechanical contractor and that the two companies were closely related.

42. Mr. Laverne Maracle also testified that it was "commonly known around Belleville that [Bill Bailey and Andreynolds] were owned by the same company" and that it was commonly known that both companies did mechanical work. He also testified however that, with the exception of a period in 1974 when he worked with Jim Salt he never worked with non-union plumbers who were employed by Bill Bailey.

43. In Mr. Christie's own evidence he admitted that the U.A. became aware that Bill Bailey was tendering work as a mechanical contractor while Les Weegent was Assistant Business Manager (sometime between 1985 - 1988). He was aware that Bill Bailey was tendering out work and was subcontracting the work to Andreynolds. Mr. Christie was unaware if any action was taken by the U.A. as a result of its, (and specifically Les Weegent's), knowledge of the relationship between the two companies but candidly admitted that his predecessor, Chris Burrows dealt more closely with Mr. Weegent than he did. Mr. Christie did however indicate that he had been to the Bill Bailey/Andreynolds premises during the period that Les Weegent was the Assistant Business Manager and would have seen the common signage on the building at that time. He met Len Webster, the manager of the plumbing divisions at that time.

44. Mr. Weegent was not called to refute, contradict, or otherwise explain any of this evidence. Mr. Weegent was available to be called, had been subpoenaed to attend the hearing, and was present on at least one day of the hearing when he could have been called. In the circumstances of this case, the failure of Mr. Weegent to give evidence which was within his power to give and through which relevant facts might have been elucidated justifies the Board in drawing the inference that his evidence would have been unfavourable to the U.A. or at least would not have supported it (see for example *Sopinka and Lederman*, The Law of Evidence in Civil Cases at p. 535).

45. Mr. Weegent started as a part-time Business Representative for U.A., Local 320 in the mid 1970's. He continued in that position until he became full-time Business Representative for Local 320. After the merger of Local 320 with Local 463 he continued as Assistant Business Manager until 1988 when he retired from the union. The evidence tendered by the respondents met the onus of proof and evidentiary burden cast upon them in respect of their "defence" that the union knew but failed to act. Thereafter the evidentiary burden shifted to the applicant. The applicant could have put in evidence to refute the respondent's evidence which attributed actual knowledge to the U.A., Local 320 and to its Business Representative, (Mr. Weegent) through Mr. Weegent. Mr. Weegent was in the best and indeed the only position to deal with Mr. Thomson's evidence for example that Mr. Weegent had been instructed to "look into" the matter and what his conclusions were as result of such investigation. Mr. Christie's honest and credible evidence deals only with the period post the Fall of 1987. It does not and cannot account for the time before the merger of Local 320 and Local 463 when Mr. Weegent was the only Business Representative of Local 320 and the evidence points to a finding that U.A. Local 320 was aware that Bill Bailey was a non-

union mechanical contractor which carried out plumbing work by or through non-union employees or subcontractors.

46. Counsel for the U.A. has argued that the knowledge which a union must have before an application is dismissed by reason of delay is actual knowledge that a related corporation is undermining or eroding the bargaining rights of the union. He submits that, in this case, although the union knew that Bill Bailey was a mechanical contractor which tendered on plumbing work for some time, the union did not have actual knowledge of the erosion or undermining of its bargaining rights because it did not know that Bill Bailey ever subcontracted the work to non-union subcontractors or otherwise performed the work itself. Rather, the union only knew that Bill Bailey tendered on jobs but thought that it then subcontracted the plumbing portion of the work back to Andreynolds. As there is no "erosion" of its bargaining rights in those circumstances, there was no need for the U.A. to bring a section 1(4) application. The trade union ought not to be required to engage in costly, time-consuming litigation before the Board to obtain what it views as a superfluous single employer declaration because there has not been any erosion of its bargaining rights. Counsel asserted that it was not until the Fall of 1989 that the union became aware that Bill Bailey had changed its approach to business by directly hiring non-union plumbers to perform work which it had previously sub-contracted to Andreynolds. He submits that then the union was required to act and it did so promptly. Upon being confronted with that actual knowledge the union investigated, and filed this application with due diligence.

47. Counsel for the U.A. further asserted that for the Board to require a union business agent to check out every subcontract to determine who holds the contract and if the subcontracting arrangement is an erosion of the U.A.'s bargaining rights is much too onerous. He argues such a test is inconsistent with the Board's "due diligence" jurisprudence or the legislative recognition in section 1(5) that such information is often beyond the trade union's reach.

48. In response counsel for the respondents argued that even if the test was that the delay must be linked to knowledge of an erosion of bargaining rights or loss of job opportunities that test has been met in the circumstances of this case. Notwithstanding the fact that the trade union may not have had actual knowledge of the fact that Bill Bailey performed plumbing work in a manner other than through the subcontracting of work to Andreynolds, in light of the knowledge which the trade union *did have*, it ought to have been aware of that possibility. It should have acted promptly to foreclose the potential erosion. At a minimum it should have investigated the situation. If a trade union knows that work is going from a non-union contractor to the union contractor, it should be sensitive to the possibility that perhaps work is going the other way as well or that perhaps work is going from the non-union contractor to another non-union contractor or non-union employees. The trade union should file a section 1(4) application when it has that knowledge. In this regard counsel pointed to the evidence of Mr. Christie that he knew that Bill Bailey was an operating company that subcontracted work and was "concerned" by that fact.

49. Counsel argues that acceptance of the trade union submissions also affects the rights of the Bill Bailey employees to choose whether or not they wish to be represented by this trade union. He submits that the applicant is seeking to acquire bargaining rights to avoid the certification procedures of the Act and that a declaration ought not to be granted. (See *John Hayman & Sons Company Limited*, [1984] OLRB Rep. June 822 at 827-828). In the past Bill Bailey has subcontracted a portion of its work to non-union subcontractors without apparent complaint from the trade union. Now it seeks to have some of the work it had previously subcontracted either to Andreynolds or to non-union subcontractors performed by direct hire employees. This does not constitute such a change in Bill Bailey's approach to business that it warrants the exercise of our discretion notwithstanding the substantial delay of the trade union in bringing this application.

Counsel argues that this is especially so where the rights of employees to select their own bargaining representatives or to remain unrepresented is affected.

50. On the evidence before us need not resolve these two opposing positions. We note merely that each has merit and a certain attractiveness.

51. On the evidence before us however, we find that the trade union *did* have actual knowledge of an actual erosion of its bargaining rights or loss of work opportunities yet the U.A. apparently took no action as a result of this knowledge.

52. Certainly, in late 1987/early 1988 Mr. Christie was aware of the fact that Bill Bailey employed a registered apprentice plumber. Registered apprentice plumbers and the work they do is clearly covered by the U.A. collective agreement to which Andreynolds is bound. At the very least at that point in time therefore the U.A. had actual knowledge of an actual loss of job opportunities. Work covered by the collective agreement was being performed, and had been performed by a related employer not bound to the collective agreement. At that time the union had actual knowledge that all of the criteria necessary for a successful section 1(4) application existed yet chose not to act.

53. Mr. Christie provided a very practical reason for not filing a section 1(4) declaration at that time. He attempted to deal with the problem without litigation by having Scott Maracle join the union and thus having him become an employee of Andreynolds. Mr. Christie's common sense approach to the problem is commendable. That common sense approach or informal resolution of the *immediate problem* however, was not sufficient because the union took no steps to put the companies on notice that it objected to Bill Bailey performing plumbing work in a non-union manner. There is no evidence that after Scott Maracle's membership in the union and transference to the Andreynolds' payroll anyone from the union contacted Bill Bailey/Andreynolds to express the union's concern about what had occurred. The union took no steps to put the employer on notice that it viewed the situation as one to which section 1(4) applied or could be applied.

54. We agree with the U.A.'s assertion that it is preferable to resolve problems without litigation. We are also of the view that in these circumstances it is not necessarily incumbent upon the union to file a section 1(4) application. The parties are encouraged to continue to settle these types of labour relations matters through discussion, compromise and other non-litigious means.

55. In this instance, however there was no true resolution of the "problem" because the respondents were not put on notice by the U.A. that the union viewed the co-existence of Bill Bailey/Andreynolds and the fact that Bill Bailey did plumbing work non-union as a "problem". The "problem" was solved from the U.A.'s perspective only. The respondents remained unaware that there was any problem. Indeed, the opposite conclusion could be reached. The union's silence conveyed the message that there was no problem and that Bill Bailey could continue to employ non-union plumbers as it had with Scott Maracle and as it had throughout the 1970's.

56. In our view, at a minimum and short of filing a section 1(4) application at that time, the union could have and should have put Bill Bailey on notice that it viewed anything other than a sub-contracting of the plumbing work acquired by Bill Bailey back to Andreynolds as a dilution of its bargaining rights. It did not do so. Instead, Bill Bailey was allowed to continue to grow and develop notwithstanding the union's current contention that Bill Bailey's operations dilute or undermine its bargaining rights and job opportunities. To this extent, the case is similar to *Krest Masonry Contracting Limited, supra*, where the Board stated at page 820:

35. The evidence before us establishes that the union was aware of Canada Contracting as early

as June of 1986 when it became actively involved in residential projects and the union was conducting a strike. Union business agents approached Mr. DeRose to complain about his presence on construction sites, warning that he would not "get way with it" although little or no effort was made to organize the "non-union" bricklayers working on those sites. Thereafter, there were discussions between the union and various members of MCAT, but no section 1(4) application was made. In other words, the union was well aware, two years ago, that Canada Contracting presented a potential threat to its bargaining rights/work opportunities but chose not to pursue the remedy clearly open to it. Canada Contracting was allowed to develop and grow despite the union's current contention that it was merely a device to develop a non-union arm through the use of subcontractors. Business developed and flourished, contracts were entered into and completed, and relationships were established and terminated, while the union grumbled and complained but made no concrete effort to assert what it now claims are its statutory rights. It is understandable and indeed commendable that the union would seek an informal resolution of its concerns without resort to litigation, but there is also something to be said for the proposition that one should move promptly to assert one's statutory rights under section 1(4).

Similarly, in this case Bill Bailey also developed, bid and obtained contracts, established and terminated relationships, while the union took no steps of any kind. It did not file an application under section 1(4) but neither did it put the respondents on notice that this was possible in the circumstances.

57. In *Krest Masonry Contracting Limited*, *supra*, the Board went on to make a "prospective" single employer declaration effective as of the application date. In this manner, the employers' "reliance interest" was taken into account as it could be said that from that point in time, "the respondents would have been clearly put on notice that their subsequent business activities might be affected by pending litigation". The prejudice to the employer caused by the trade union's delay or tolerance of the double breasted company was a factor considered by the Board in the exercise of its discretion.

58. A similar exercise of our discretion is not available in the circumstances of this case because of the intervening events. In *Krest Masonry Contracting Limited*, *supra*, it was determined that a section 1(4) declaration would not "directly affect any employment relationship established since [the] incorporation in February of 1986 [of the related common employer]. No previously unrepresented employees would be "swept in" to an established bargaining relationship." The same is not true in the situation before us.

59. As the union failed to file a section 1(4) declaration, and because it failed to put the employer on notice that (at a minimum) it viewed the direct hire of non-union plumbers as an erosion of its bargaining rights, Bill Bailey hired non-union plumbers to perform work which in the past it had sub-contracted either to another non-union contractor or to Andreynolds. No steps were taken by the union to put the company on notice that, in the union's view, it could not do that. Bill Bailey had employed non-union plumbers at various times in the 1970's, and had employed a non-union apprentice plumber from 1986 to June 1988 without complaint from the union. As indicated we find that the union had actual knowledge of these facts but took no steps to assert its rights in any way on those occasions.

60. In *John Hayman and Sons Co. Ltd.*, [1984] OLRB Rep. June 822 at page 827-828, the Board set out certain criteria which it may use in determining whether to exercise its discretion found in section 1(4) of the Act. In addition to a reference to delay and due diligence by the trade union, (Criteria No. 4 in the decision) the Board noted that it would consider "whether a declaration would interfere with the interests and rights of employees to select their own bargaining representative or to remain unrepresented" and "whether the applicant is seeking to acquire bargaining rights by means of section 1(4) in order to avoid the certification procedures of the Act." We view those criteria as being applicable to the case before us.

61. It may be, as the Board noted in *Krest Masonry Contracting Limited*, that "a failure to move expeditiously should [not] totally foreclose [an] applicant from the remedy it seeks." We make no finding in that regard. In our view however, because of the intervening events which occurred because the applicant failed to move expeditiously, the prejudice to the respondents which results from that delay, and the fact that the delay directly affects the rights of the presently unrepresented employees to select their own bargaining representative or remain unrepresented, the applicant in this instance is foreclosed from obtaining the remedy it seeks in this application.

62. For all of these reasons the application in Board File 2791-89-R is also dismissed.

2527-86-R Local 27, United Brotherhood of Carpenters and Joiners of America, Applicant v. Century Store Fixtures Ltd., Century Interiors Ltd., Jasper Construction Inc., Respondents

Construction Industry - Related Employer - Employees of speciality contractor supervised by general contractor partially owned by same employer - "Control test" different in construction due to hiring hall requirements and to transitory nature of industry - Application dismissed

BEFORE: *Inge M. Stamp*, Vice-Chair, and Board Members *W. Gibson* and *C. A. Ballentine*.

APPEARANCES: *David McKee* and *Dorrington Smith* for the applicant; *Michael Horan, F. Appugliesi* and *Carlo Osselome* for Century Store Fixtures Ltd. and Century Interiors Ltd.; *Walter Thornton* and *John Appugliesi* for Jasper Construction Inc.

DECISION OF THE BOARD; November 9, 1990

1. The applicant is applying under section 1(4) of the *Labour Relations Act* for a declaration that the respondents are to be treated as one employer for purposes of the Act. The applicant further seeks a declaration that the respondent Jasper Construction Inc. (hereinafter referred to as "Jasper") is bound to the provincial collective agreement in the ICI sector of the construction industry.

2. The parties submitted a statement of agreed facts which was supplemented by *viva voce* evidence and numerous documents relating to the respondents' businesses. Highlights of the agreed facts and a history of the parties' proceedings are set out below. The parties were substantially in agreement on the facts which are material to this application.

3. Century Store Fixtures Ltd. ("hereinafter referred to as CSF or Century") was incorporated effective July 25, 1978. At this time CSF manufactured store fixtures at its shop and also performed general interior construction, including the installation of the store fixtures it manufactured. On July 17, 1979 CSF executed a short form collective agreement binding it to the carpenters' provincial collective agreement.

4. Jasper was incorporated on December 3, 1982 as a general contractor.

5. On May 2, 1986, Century Interiors Ltd. ("hereinafter referred to as CIL or Century")

was incorporated. The function of CIL was to take over the construction portion of CSF's business. CIL advised the applicant, by letter dated July 8, 1986, that Century Interiors Ltd. was the new name for Century Store Fixtures Ltd.

6. On May 30, 1984, the Board, differently constituted, dismissed (on consent) a section 1(4) application brought by the applicant with respect to the above-named respondents and Jascan Properties Inc. ("hereinafter referred to as "Jascan").

7. By decision dated September 26, 1988, the Board, differently constituted in part, dismissed an application for certification with respect to Jasper.

8. Jasper is a partnership owned by the Appugliesi and the DeGasperis families. Century is owned by the Appugliesi family exclusively.

9. The events that led to the filing of this section 1(4) application and the application for certification with respect to Jasper, referred to in paragraph 7 above, occurred in 1986. A number of carpenters hired through the Carpenters Hiring Hall and dispatched to Century wound up working on Jasper sites. Their time was kept by a Jasper supervisory person and sent to Century who then billed Jasper for the labour supplied to Jasper. The work performed by these carpenters is described in the Statement of Agreed Facts under paragraph 16(m) as follows:

16. (m) The work performed at the sites referenced in paragraph 16(f) was general carpentry including the making of templates, the setting of anchor bolts on concrete casings, the building of roof trusses [sic], the building of eaves and soffits around the edge of a roof, erecting of walls and partitions and placing of plywood sheathing on roofs. It did not include interior work.

10. The carpenters were directed by Jasper, the general contractor on the jobsite, transferred to other sites and laid off when the work was completed.

11. The Board, differently constituted in part, in paragraph 25 of its decision dated September 26, 1988 dealing with the certification application, found:

25. The three carpenters in question had no doubt whatsoever as to who their employer was. They knew they were employed by the intervener [Century]. It was the evidence of one of the carpenters that he assumed "Vince", the person noted on the referral slip, was with Century, since Century was the company that had hired him.

12. The referral slips for the carpenters were made out to "Century Store", "Century" and "Century Store Fix" and instructed the carpenters to "see Vince".

13. The carpenters were hired through the union hiring hall and paid by Century in accordance with the provincial collective agreement.

14. Century is an interior contractor who also is in the manufacturing business. Century does a large volume of business with Jasper and Jascan and has a number of other clients such as Kinney Shoes, Cadillac Fairview, Canada Trust, Bulk Barn Foods, Miracle Food Mart and others. Contracts varied from labour only to time and material to lump sum. The business of Jasper on the other hand is that of a general contractor.

15. Counsel for the applicant submits that the Board should declare the respondents one employer under the *Labour Relations Act* because Century engaged in the general contracting business when its carpenters worked on the Jasper sites. Century was not doing interior work. Both Jasper and Century are engaged in the same enterprise, that of general contracting. The con-

trol exercised by Jasper was such that Jasper determined the employment relationship. The applicant contends that Century is doing a portion of the general contractor's work, in a manner which is not in a contractor and sub-contractor relationship, but in an associated and related way of carrying on the business with common control and direction at the top and on the jobsite.

16. The applicant submits that it is concerned with the preservation of bargaining rights. In terms of a simple section 1(4), this is not a case of Jasper being bound and using Century. It is the other way around. There are not the same institutional interests of the trade union in this case but there is an issue that goes to the nature of the construction industry. In *Industrial-Mine Installations Limited*, [1972] OLRB Rep. Dec. 1029, para. 10, the Board found as follows:

10. Prior to the enactment of section 1(4), where such situations existed, it was difficult to define the employment relationship and to determine the proper employer for certain purposes under the Act. For example, in certification proceedings it was necessary to determine the proper employer in order to determine whether the union had sufficient membership among the employees to be certified.

When Century has so little control and Jasper is so dominant in the employment relationship, the control is in the hands of someone who is not bound by that collective agreement.

17. The applicant submits there are two companies carrying on associated or related activities, to the extent that the control of that portion of Century's business is in Jasper's hands. There is a threat to the bargaining rights with respect to Century.

18. Cases cited by the applicant in support of its position include: *Frank Plastina Investments Ltd.*, [1986] OLRB Rep. June 720; *Warren Steeplejacks Limited*, [1989] OLRB Rep. March 309; *Stebill Limited*, [1989] OLRB Rep. Apr. 384; *Del Zotto Enterprises Limited*, [1974] OLRB Rep. Aug. 533; *J.H. Normick Inc.*, [1979] OLRB Rep. Dec. 1176; *Donald A. Foley Limited*, [1980] OLRB Rep. Apr. 436; *Corp. of the City of Stratford*, [1985] OLRB Rep. June 923; *Industrial Mine Installations Limited*, *supra*; *United Shelters Ltd.*, [1981] OLRB Rep. June 796; *Brink's Canada Limited*, [1987] OLRB Rep. May 647.

19. The applicant submits that the Board should exercise its discretion because of the possibility of problems and the loss of opportunity in the employment relationship because of the lack of control which Century was able to exercise over the jobsites. There is a danger when there is a payroll problem, such as with Felix Brown, that Jasper might just say "get lost". It might have happened.

20. Counsel for Jasper submits that these are not related or associated businesses. He argues that the respondents have totally different clients or customers and the law in the cases cited support the finding that these businesses are not related or associated. The four jobs described in paragraph 16(f) of the Statement of Agreed Facts are not representative. Jasper's revenue in the relevant period was twenty-six million dollars, in relation to that of Century's, which was two million dollars. Counsel relies on two decisions, *Candesco (1978) Ltd.*, [1985] OLRB Rep. Jan. 44 and *Arbis Construction Ltd.*, [1983] OLRB Rep. Dec. 1959. Counsel submits that Jasper's business is quite separate from Century's. The facts in *Frank Plastina Investments Ltd.*, *supra*, do not exist here. The businesses have developed separately and do not rely on one another as a source of business.

21. Section 1(4) states:

1.-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual,

firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

22. In *Walters Lithographing Company Limited*, [1971] OLRB Rep. July 406, the Board set out certain indicia for making determinations with respect to section 1(4) of the Act. These are: (1) common ownership or financial control, (2) common management, (3) interrelationship of operations, (4) representation to the public as a single integrated enterprise, and (5) centralized control of labour relations. Before the Board may exercise its discretion under section 1(4) there are certain statutory prerequisites. These are:

- (1) There is more than one entity, i.e., corporation, individual, firm, syndicate, association or any combination of these things.
- (2) These entities are engaged in associated or related activities.
- (3) The entities are under common direction or under common control.

23. With respect to the requirement that the entities be under common direction and control, only Century is owned solely by the Appugliesi family, while Jasper is owned by the DeGasperis and Appugliesi families.

24. The Board in paragraph 14 of *Arbis Construction Ltd.*, [1983] OLRB Rep. Dec. 1959 has addressed the question of "associated or related" as follows:

14. The question of whether Arbis and Azar are "associated or related" requires the Board to consider the nature of their business activities. As the Board pointed out earlier, Arbis and Azar are engaged in different aspects of property development and construction. As the Board stated in *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945, businesses or activities are "related" or "associated" because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills and are carried on for the benefit of related principals. In our view, Arbis and Azar are neither of the same character nor serve the same general market.

25. Jasper is a general contractor who has been in business since 1982. Century has been in business since 1978. The business of Century since inception has been to manufacture and install store fixtures. There is no evidence to suggest that Jasper has any interest in becoming a specialty contractor manufacturing and installing store fixtures. It is Century who signed a voluntary recognition agreement giving bargaining rights to the Carpenters. There is absolutely no evidence to suggest that Century was trying to avoid its obligation under the collective agreement by having Century's carpenters working on Jasper sites and being supervised by Jasper in its capacity as the general contractor on site. At no time was there any misunderstanding as to whose employees these carpenters were, either by the employees themselves, Jasper or the dispatcher of the hiring hall. The Board, differently constituted in part, in its decision in the application for certification arising out of the same circumstances stated:

28. It is not unusual in the construction industry for the general contractor to supervise sub-trades. It is also not unusual for tradesmen to be "loaned out". The criteria used to determine who exercises fundamental or overriding control rather than immediate control is somewhat different in the construction industry due to the transitory nature of the industry and the requirement for unionized contractors to hire through the hiring hall. Even though the respondent's representative called the union's hiring hall and was the person named on the referral slip, there was no doubt in the minds of the dispatcher (as indicated by the referral naming the intervener as the employer) nor the employees who were emphatic that they worked for the intervener.

There is no significance in the circumstances of this particular situation that the respondent's representatives advised the employees that the job was completed. Construction workers generally are quite aware when a given project or work assignment nears completion and would attach no more significance to it other than "the job is finished" as it was in this case.

29. The relationship between the intervener and the respondent, by virtue of their personal relationship, is close and some of the business transactions between the respondent and the intervener are somewhat casual, but they are however separate entities who carry on their separate businesses. Both entities have separate WCB numbers and treat their direct-hire employees differently. There was no evidence of any carpenters other than those employed by sub-contractors. In the case before us, there was no improper purpose nor any attempt to circumvent the collective agreement.

The intervener referred to in the certification application above is Century, the respondent is Jasper.

26. At all relevant times the employment relationship of the carpenters working on the Jasper sites was covered by the collective agreement between Century and the applicant. More importantly, the employees were never in any doubt as to who their employer was. In paragraph 26 of the decision (differently constituted in part) in the application for certification the Board found as follows:

26. No intention to create an employment relationship exists in this case. The three carpenters were dispatched from the hiring hall to a union contractor who had been in a contractual relationship with the union for some time. The carpenters would not have worked for the respondent under conditions of employment as existed for example for Mr. Theriault.

27. In the cases cited by the applicant there is either real or potential erosion of bargaining rights. This is not the case before us. In the instant case the unionized firm is not directing work to a non-union firm. The union's bargaining rights with respect to Century are in no danger. At all relevant times Century's carpenters were covered by the collective agreement. Any opportunity Century has to perform carpentry work for Jasper, or any other general contractor, is work that is covered by the collective agreement between Century and the applicant.

28. The fact that carpenters employed by Century (as the Board had found in the certification application) did "general" carpentry work does not make Century a general contractor. The market for the manufacture and installation of store fixtures is not the same market as that of a general contractor. These businesses operate in different aspects of the construction industry. This section 1(4) application would extend bargaining rights rather than protect the existing bargaining rights held by the applicant with respect to Century. There is no evidence that Jasper is going into the business of manufacturing and installing store fixtures. However, even if Century were to act as a general contractor, Century is bound to the Carpenters' provincial agreement and the applicant holds bargaining rights for Century regardless of the type of carpentry work performed by Century.

29. Accordingly, the application under section 1(4) is hereby dismissed.

0558-90-R; 0597-90-R International Brotherhood of Painters & Allied Trades Local 1824, Applicant v. Courtesy Group Inc. c.o.b. Courtesy Maintenance, Respondent

Certification - Construction Industry - Employer engaged primarily in cleaning and maintenance, but having four employees hired to paint university student residence - Primary purpose of painting was decoration rather than maintenance - Employer engaged in construction industry - Certificate issuing

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. N. Fraser* and *C. McDonald*.

APPEARANCES: *Elizabeth Mitchell* and *George McNeney* for the applicant; *D. Brent Labord*, *Jim Schroeder* and *Steve Falk* for the respondent.

DECISION OF G. T. SURDYKOWSKI, VICE-CHAIR AND BOARD MEMBER C. MCDONALD;
November 14, 1990

1. The name of the respondent in both of these applications is amended to read: "Courtesy Group Inc. c.o.b. as Courtesy Maintenance".

2. The applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister for section 139(1) of the Act on April 12, 1978, the International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades is that designated employee bargaining agency. It has been designated to represent, among others, journeymen and apprentice painters represented by its affiliated bargaining agents in bargaining in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

3. Board File No. 0597-90-R is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 114(1) of the Act.

4. The respondent took the position that it is not employer in the construction industry and that the construction industry certification provisions of the Act have no application to it. This threshold issue was argued by the parties on the basis of an agreed statement of fact. Upon hearing the statement of fact and the representations of the parties, the majority of the Board (Board Member Fraser dissenting) ruled, orally, that the respondent is an employer in the construction industry within the meaning of the Act for the purposes of the application in Board File No. 0597-90-R.

5. Although the respondent's business is primarily in cleaning and maintenance, the respondent had four employees, who were specifically hired for that purpose, engaged in painting various hallways, lounges and rooms in the student residence at Wilfred Laurier University in Waterloo at the time that is material to this application. This work was being performed pursuant to an agreement between the respondent and the university entered into on or about May 2, 1990. The surfaces painted by the respondents' employees had been painted and repainted on a number of occasions. In fact, it was agreed that the residence that the respondent had been contracted to paint had been repainted approximately every two years. The university selected the colour of paint, which was the same as that previously on the various surfaces - beige. There was some incidental patching of the surfaces required prior to painting. The painting was done using rollers.

6. The applicant conceded that not all painting is construction work but argued that the painting done by the respondent at the Wilfred Laurier University student residence in this case was. The respondent argued that it was in the nature of maintenance work, not construction.

7. The nature of painting is such that it is often difficult to determine whether it is construction work or not. In *Gallant Painting*, [1987] OLRB Rep. Mar. 367, the Board dealt with a similar question as follows:

11. The evidence reveals that, at the time the application was made, the respondent was engaged in painting various platforms, railway cars, buildings, pipes, tanks and other containers, and other structures at the petrochemical complexes operated by Petrosar Limited and Dupont Canada Inc. in Corunna, near Sarnia. Though some of the painting was within or of enclosed structures, the bulk of it was of exterior structures. All of the painting done by the respondent was of existing operating structures that had been painted before. Further, this painting was part of the ongoing plant "maintenance" programs of Petrosar and Dupont. The purpose of the painting was and is to apply a coating that will preserve and protect the structures from corrosion and thereby extend their useful lives. Colours, though selected by Petrosar and Dupont respectively, are dictated by the concern for protection and by legislation. We find that, contrary to the suggestion of the applicant, aesthetics plays little or no role in the painting and only becomes a consideration, if at all, after the primary goal of protection is achieved and the dictates of the legislation are satisfied. We are also satisfied that there is a difference between the techniques and materials used in the relevant painting done by the respondent and the techniques and materials used in new construction painting.

12. Subsection 117(c) of the Act defines an "employer" in the construction industry as follows:

117.(c) "employer" means a person who operates a business in the construction industry, and for purposes of an application for accreditation means an employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof;

To be an employer in the construction industry, one must do work in the "construction industry" which is defined, in subsection 1(1)(f):

(f) "construction industry" means the business that are engaged in construction, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof;

13. Though the words "maintenance" and "maintaining" do not appear in the Act, the distinction between maintenance work and construction work has long been recognized by the Board (see for example, *Tops Marina Motor Hotel*, 64 CLLC ¶16,004; *Dravo of Canada Ltd.*, [1967] OLRB Rep. June 261; *Quinard Limited*, [1982] OLRB Rep. July 1054). Unfortunately, there is no sharp line that separates construction work on one hand from maintenance work on the other, and what is referred to as "maintenance" work in the broad sense or for internal corporate purposes is not necessarily maintenance work for labour relations purposes. In argument, both the applicant and the respondent relied on the Board's decision in *The Master Insulators' Association of Ontario Inc.*, [1980] OLRB Rep. Oct. 1477. In addition, counsel for the applicant submitted that the painting done by the respondent at the Petrosar and Dupont facilities was (and is) "decorating" within the meaning of that word as used in section 1(1)(f) of the Act. He argues that the Act uses "decorating" in an industrial or generic sense rather than in any purely aesthetic sense.

14. In *Master Insulators'*, (supra at paras. 28 and 29), the Board explained the distinction between construction work and maintenance work as follows:

28. With the exception of the work performed at the premises of Fearman and the work on a new emergency shower and minor work in a change house at Stelco, the work performed by the employers who were named in this complaint was essentially

similar in nature. In our view, the work at the premises of Fearman, which involved an addition to an existing facility and involved both relocation of producing units and the expansion of existing capacity, was clearly new construction. Similarly, the work on the emergency shower and change house at Stelco was in an addition for the safety and comfort of Stelco's employees and represented new construction. This work is clearly within the industrial, commercial and institutional sector of the construction industry. *The rest of the work referred to in the complaint was, for the most part, clearly work which sustained and maintained an operating facility and enabled that facility either to operate efficiently or to attain its designed or production capacity and is to be regarded as maintenance work. Maintenance work is to be distinguished from construction work which involves the addition to an existing facility or which will increase the designed or production capacity of an existing facility.* However, in so far as there was work of new construction, which was purportedly done under the maintenance agreement, it was a violation of section 134a(1) of the Act.

29. Maintenance work performed by the employers who were named in this complaint is in reality part and parcel of the production and maintenance operations of the industrial clients for who the work is performed. These industrial clients may, and frequently do, perform their own maintenance work with their own employees who are included in their own industrial bargaining units. In the context of the work affected by this complaint "maintenance" is difficult [sic] to distinguish from "repair". In our view, *it is a question of the context of any given work and the degree of addition or subtraction of such work to an existing system or part of a system. Where the work assists in preserving the functioning of a system or part of a system, such work is maintenance work.* Where the work is necessary to restore a system or part of a system which has ceased to function or function economically, such work is repair work. "Maintenance" and "repair" are not mutually exclusive concepts, and lack of adequate maintenance will surely produce a situation where repair becomes inevitable. In our view, the performance of adequate and timely maintenance forestalls or reduces the requirement for repair.

[emphasis added]

Though it was asserted in this proceeding that the respondent was (and is) engaged in "decorating" (rather than "repairing"), we find this reasoning equally applicable to the issue in this proceeding and we adopt the same. Further, the words used by the legislature must be interpreted within the context in which they are used. However, insofar as it is possible within that context, the words must be given their plain and ordinary meaning. The Legislature chose to use the word "decorating" as opposed to "painting" or some other word. The verb "decorate" is defined by the Concise Oxford Dictionary (6th ed) as meaning to "furnish with adornments". According to that same dictionary, to "adorn" is to "add beauty or lustre to" something; in other words, to improve its appearance. Accepting the submissions of the applicant would give an unnatural meaning to the word "decorating" and create a situation where virtually no painting would be maintenance work. On the other hand, the respondent's position, which we accept as correct, uses "decorating" in its plain and ordinary sense and leads to an acceptable labour relations result; that is, painting can be either maintenance work or construction work, depending on the circumstances.

15. In the results, we find that, insofar as the painting done by the respondent was and is of existing structures done for the primary purpose of sustaining and protecting operations systems, it must be classified as maintenance work. Consequently, this application for certification was not properly made pursuant to the construction industry provisions of the Act.

(See also *Keith Holdsworth Consulting Ltd.*, [1989] OLRB Rep. June 619).

8. We agree. In our view, it is particularly appropriate to take a purposive approach in determining whether or not any particular painting is construction work.

9. In our view, the primary purpose for the painting in this case was a decorative one. It was not a matter of attempting to sustain or protect the function of the premises being painted.

Rather, it was to decorate the premises in order to improve the appearance of the student's residence and thereby improve the quality of the living space. The colour of paint being used was of little relevance, although we do observe that beige can be used as a decorative colour. And, while the repetitive nature of the painting is a relevant consideration, it is certainly not determinative. It is not unusual for living spaces to be redecorated periodically.

10. Clause (c) of section 117 of the Act defines an "employer" in the construction industry as:

- (c) ...a person who operates a business in the construction industry, and for purposes of an application for accreditation means an employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof;

As the Board observed in *Ridsdale Steel Fabricators Inc.*, [1987] OLRB Apr. 601:

10. ...Nowhere in the Act is it stipulated that a person must operate a business that is engaged solely or even primarily in the construction industry in order for that person to be an employer in the construction industry. Nor has the Board required that a person's business be operated solely or primarily in the construction industry in order for that person to be an employer in the construction industry (see, *The Board of Education for the City of Windsor*, [1983] OLRB Rep. May 831 and the Board decisions cited therein at paragraph 10). Similarly, there is no requirement that an employee perform a majority or any of his work on construction site in order to be an employee in the construction industry. It is sufficient for an employee to be "commonly associated in his work or bargaining with on-site employees". Consequently, it is not correct, in our view, to say that an employer engaged in construction and non-construction activities with the same work force cannot be an employer in the construction industry.

(See also *Keith Holdsworth Consulting Ltd.*, *supra*).

11. Having been engaged in construction activities at the time that is material in Board File No. 0597-90-R, the respondent is an employer in the construction industry within the meaning of the *Labour Relations Act*.

12. In the result, we were satisfied that the application in Board File No. 0597-90-R was properly made pursuant to section 144(1) of the Act.

13. The Board then went on to find that, having regard to the provisions in section 144(1) of the Act, all journeymen and apprentice painters in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen and apprentice painters in the employ of the respondent in all other sectors of the construction industry (that is, excluding the industrial, commercial and institutional sector) in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foremen, constitute a unit of employees of the respondent appropriate for collective bargaining.

14. Having regard to the agreement of the parties with respect to the list of employees in the bargaining unit on the date of application and the membership evidence filed by the applicant in support of its application, we were satisfied, on the basis of all the evidence before the Board, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on June 13, 1990, the terminal date fixed for the application in Board File No. 0597-90-R and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

15. Consequently, pursuant to section 144(2) of the Act, a certificate, *to be dated November 14, 1990*, will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agents named in paragraph 2, above, in respect of all journeymen and apprentice painters in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

16. Further, and also pursuant to section 144(2) of the Act, a certificate, *also to be dated November 14, 1990*, will issue to the applicant in respect of all journeymen and apprentice painters in the employ of the respondent in all sectors of the construction industry other than the industrial, commercial and institutional sector in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries township), save and except non-working foremen and persons above the rank of non-working foreman.

17. On consent of the parties, the application in Board File No. 0558-90-R is withdrawn with leave of the Board.

DECISION OF BOARD MEMBER W.N. FRASER; November 14, 1990

1. I dissent.

2. I disagree with the decision of the majority in finding that the Respondent is an employer in the construction industry in accordance with section 117(e) of the Act.

3. The work in question, the re-painting of existing surfaces at the Nils Willison and Carla Conrad residences at Wilfred Laurier University is, in my opinion, maintenance rather than construction.

4. The re-painting of existing surfaces is carried out on a regular basis, said to be every two to three years. The owner chose a beige colour, the same as has been used previously.

5. The continuing nature of this work, together with the use of the same beige coloured paint, seems to me to be more to maintain cleanliness, than for decorative purposes.

6. I would not have found the Respondent to be an employer in the construction industry and would dismiss the application for certification under Section 144(2) of the Act.

2135-89-OH Domenico Paolo, Complainant v. Crothers Ltd., Respondent

Health and Safety - Employee asked by supervisor to resign lead hand position - Employee had criticized supervisor's health and safety practices at a meeting shortly before - Supervisor was aware of criticism - Employer failing to rebut inference of anti-safety animus - Board directing reinstatement in lead hand position and compensation

BEFORE: Ken Petryshen, Vice-Chair, and Board Members G. O. Shamanski and C. McDonald.

APPEARANCES: J. H. Bettes, Joe Flexer and Domenico Paolo for the complainant; M. Contini and J. D. O'Brien for the respondent.

DECISION OF KEN PETRYSHEN, VICE-CHAIR, AND BOARD MEMBER C. McDONALD;
November 30, 1990

1. The name of the complainant is amended to read: "Domenico Paolo".
2. In this complaint, D. Paolo alleges he has been dealt with by Crothers Ltd. ("Crothers") contrary to section 24(1) of the *Occupational Health and Safety Act* ("OHSA").
3. D. Paolo resigned his lead hand position in the welding shop in mid-September 1989. The essence of his complaint is that he was compelled to resign this position by his supervisor because of certain health and safety complaints he had made to a company official in August 1989. Paolo wants his lead hand position restored and compensation for his losses. Crothers took the position that Paolo resigned his lead hand position voluntarily and that, in any event, there is no basis for concluding that Crothers' conduct towards him was motivated in any way because Paolo had raised certain health and safety concerns.
4. C. Cereser, the welding supervisor, and H. West, the Toronto shop manager, testified for Crothers. Paolo, T. McNally and J. Flexer gave evidence in support of the complaint. In making its factual determinations, the Board has carefully reviewed all of the evidence and the parties' submissions relating thereto.
5. Before setting out the facts, it is useful to review the Board's approach to complaints of this type. Section 24 of the *OHSA* prohibits an employer or a person acting on behalf of an employer from penalizing a worker because the worker has acted in compliance with or sought the enforcement of the *OHSA* or the Regulations. The nature of the Board's inquiry into a section 24 complaint under the *OHSA* is addressed in *Commonwealth Construction Company*, [1987] OLRB Rep. July 961 at paragraph 21:

21. The issue we must decide is why the complainants were discharged. This turns on our finding of the facts, based on our assessment of the evidence and whether we believe the company's claim that it discharged them because they wouldn't perform their work, or the complainants' claim that they *were* performing their work and never took company time for their pursuits, and were discharged because they raised safety matters. Put in terms of the statutory language, were the complainants discharged *because* they acted in compliance with the Act or *because* they sought its enforcement? It is important to understand that what is protected by the Act is the right of employees not to be threatened or disciplined *because* of their acting in compliance with the Act (or regulations etc.) or seeking its enforcement. An employee might engage in conduct warranting discipline, and in those circumstances an employer can impose discipline, provided the discipline is not motivated even in part by a concern that the employee was acting in compliance with or seeking to enforce the Act. Discipline levied for that reason is proscribed by section 24(1). Whether a breach is found will depend on whether the Board concludes that the dis-

ciplinary response was even partially prompted because the employee was seeking to exercise his or her rights under the Act. In this respect, the Board's inquiry under section 24 of this Act parallels the nature of the inquiry under section 89 of the *Labour Relations Act*. As the Board noted in *Westinghouse Canada Limited*, [1980] OLRB Rep. April 577:

44. We now turn to the unfair labour practice provisions underlying this compliant and to a consideration of the law as it relates to the degree of anti union motive necessary to establish such violations of the Act. For the purpose of our analysis it is useful to distinguish between decisions affecting individual employees and major business decisions having potentially broader impact. In dealing with the treatment of individual employees this Board has consistently held that if only one of the reasons for an employer's actions against an employee (discharge, layoff, transfer, demotion, etc.) is related to union activity the action is in contravention of the Act. Given the reverse legal onus mandated by section 79(4a) the Board has held that to find there has been no violation of the Act in these kinds of cases it must be satisfied that the employer's actions were not in any way motivated by anti-union sentiment. The Board summarized this approach and the effect of the statutory reversal of the legal burden of proof in *The Barrie Examiner* case, [1975] OLRB Rep. Oct. 745 as follows:

... the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct.

This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the act has occurred.

(See also *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 294 and *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299). Judicial support for this application of the law is found in *Regina v. Bushnell Communications et al* (1973), 1 O.R. (2d) 422 wherein the Ontario High Court overturned a lower court decision which had dismissed a complaint under section 110(3) of the *Canada Labour Code*, which is identical in all material respects to section 58 of the *Labour Relations Act*, on the grounds that membership in a union was not established as the 'principal reason' for the termination of employment. The High Court held:

In considering an enactment devoid of the words 'sole reason' or 'for the reason only' applied to the act of dismissal and resting only on the word 'because', the Court must take an expanded view of its application. If the evidence satisfies it beyond a reasonable doubt that membership in a trade union was present to the mind of the employer in his decision to dismiss, either as a main reason or one incidental to it, or as one of many reasons regardless of priority, s. 110(3) of the *Canada Labour Code* has been transgressed.

The decision of the High Court was upheld on appeal by the Court of Appeal (4 O.R. (2d) 288) and was cited with approval by the Federal Court in *Sheehan and Upper Lakes Shipping Limited et al* (1977), 81 D.L.R. (3d) 208. In this jurisdiction, therefore, the Board, with judicial support, applies a 'taint theory' in dealing with alleged unlawful treatment of individual employees. If an employer's actions impact against individual employees and the motives underlying the employer's actions are in any way tainted by an anti-union animus the employer is in violation of the Act.

The same sorts of considerations and analysis apply in our view to alleged violations of Section 24 of the *Occupational Health and Safety Act*. If the respondent has convinced us that no part of the reason for the discharges was concern over the complainants' seeking enforcement of the

Act or acting in compliance with it, then the respondent will not have violated section 24 of the Act.

6. D. Paolo has been employed by Crothers for approximately 9 years in its welding shop and for the last 7½ years as a lead hand. On August 23, 1989 Paolo, along with ten other employees in the welding area, attended a session on material handling presented by M. Migliazza, the safety and security supervisor. Cereser was unable to attend this session, which in part was being held in response to a 1988 order by a Ministry of Labour inspector. A September 7, 1989 memorandum from Migliazza to West, which refers to the August 23, 1989 session, reads as follows:

On 23 August, I presented a session on Material Handling (manual and crane/sling) to eleven of our employees from the Welding Department. Although it was intended for all employees of this area, some were absent due to vacation or other reasons. The employees in attendance were as follows:

• • •

The session was received quite well and for the exception of one employee, they all participated with interest during the question and discussion periods. The employee that did not participate (did not answer written or verbal questions) explained that his lack of interest was because he viewed this session as a waste of time.

When I asked the employee to explain, he brought forward a number of points. As he talked, other participants also voiced concerns or just nodded their heads in confirmation.

The points, in general form, are as follows:

- Carl Cereser brings forward sensible safety rules, but does not enforce them.
- There is no follow-up on safety concerns.
- Safety talks are not presented regularly.
- Safety supplies or equipment in the shop are not replenished or are allowed to deteriorate.

The list would have continued, if I had not stopped them, as the "discussion" was getting rather loud and heated.

We obviously have a morale problem in this area, and credibility of Management's commitment to Safety is suffering.

Following the session, I visited Building "C" and through inquiries and observations, I confirmed the above noted concerns. The lack of credibility as to Management's commitment is not isolated to the Welding Shop - it is rampant throughout *all* of Building C. Lack of action, on the part of supervision is, unfortunately, the cause. Whenever action is taken, it is re-active and is perceived as "forced". This of course, does nothing towards improving safety awareness, if anything, it acts as a negative.

The safety record of Tractor bears this, as 57% of its lost time injuries have originated in Building C (3 from welding, 1 from Undercarriage).

Considering the inherent hazards of this building's operations, we have to achieve a turn-around in attitude for its employees. Before this can be achieved, the supervisory attitude has to turn-around first.

As always, I am available to advise, suggest changes and issue reminders - but - the actual implementation and enforcement is the responsibility of operational supervision.

Paolo is the employee referred to in the second and third paragraphs in the above memorandum. He did not fully participate during the session and he was critical of Cereser's handling of certain health and safety matters. The Board is satisfied that in raising these health and safety concerns

Paolo was complying with the *OHSA*. The Migliazza memorandum was sent to other members of management, including G. Gregory.

7. Paolo testified that for approximately two weeks after the training session, nothing of any significance changed concerning his lead hand role. Paolo stated that after this two-week period, Cereser began to assign the work directly to the employees in the welding shop rather than through him, the lead hand. It was not long after this that Paolo and Cereser had a conversation in Cereser's office. Paolo testified that it was during this September 13 discussion that Cereser told him that he should resign his lead hand position. Paolo stated that one of the reasons that Cereser gave for making this suggestion was that Paolo was too "mouthy" in bringing some dangerous things to the attention of management. On September 14, Paolo had a meeting with West and resigned as a lead hand. Paolo stated in his evidence that because he was no longer performing the lead hand's role and as a result of Cereser's desire to have him resign, he felt compelled to resign his lead hand position.

8. The evidence of Crothers' witnesses concerning what occurred after the training session indicates that after receiving the Migliazza memorandum, West met with Cereser and read him the contents of the memorandum without providing him with a copy of it. West indicated that several employees had raised concerns regarding safety in the welding shop and directed Cereser to do a general audit of that area and to make whatever changes were appropriate. Cereser complied with the direction and corrected some minor problems he detected. Cereser testified that he was not advised by anyone that Paolo had raised concerns about his handling of health and safety matters until October 30, 1989, a time subsequent to Paolo resigning as a lead hand.

9. In his evidence, Cereser denied that there was any change to Paolo's lead hand role after the training session. On September 13, 1989 Cereser noticed that Paolo and another employee by the name of Rotundi were engaged in a conversation concerning a hammer, the details of which are unimportant. According to Cereser, Paolo was yelling at Rotundi in a loud voice and this conduct was viewed by him as inappropriate for a lead hand. Cereser called Paolo into his office to discuss the incident. Cereser testified that Paolo was not convinced that he acted improperly and this caused him to tell Paolo that he had a problem with his attitude and if he could not change it, perhaps he should consider resigning as a lead hand. Paolo responded by saying that he might just do so, but if he did resign it would be to West and not Cereser. Paolo asked and received Cereser's permission to see West and left Cereser's office. On the following day, West advised Cereser that Paolo resigned his lead hand position. Cereser testified that his suggestion about resigning had nothing to do with complaints made by Paolo regarding safety matters. Cereser also denied telling Paolo during their September 13 discussion that he had been too "mouthy" in raising safety concerns which had the result of creating problems for him with his supervisor.

10. On September 14, 1989, Paolo met with West in his office and indicated that he wanted to resign his lead hand position. According to West, Paolo indicated that he had had enough of the hassle and just wanted to work as a welder. West asked him if he wanted to discuss the reasons and Paolo said no. On five occasions during the meeting, West asked Paolo if he wanted to reconsider his decision and Paolo replied in the negative. Before leaving West's office, Paolo pulled a letter out of his pocket and showed it to West. That letter, which West thought was not dated when he first saw it, is addressed to George Crothers and George Gregory and reads as follows:

This is regarding the safety meeting with Mario. According to my boss, I was too mouthy in bringing some dangerous things up to date. Mr. Serise (my boss) had a discussion with Mr. Gregory and on September 13, he called me in his office and he forced me to re-sign [sic] my position as lead-hand because he said I create problems with Mr. Gregory, the workers in the welding shop, and everyone else. I would like you to do some research from one supervisor to

another and from the warehouse to bay 15 to see if I gave any problems or if I have any arguments [sic] with other employees. I had a few arguments with a few of Mr. Serise's drug and booze suppliers [sic]. That is why he does not want me for lead-hand. I would just like to call to your attention the kinds of foreman/supervisor that are working here.

Around two years ago Mr. Serise phoned me up and asked for me to go to his house because he had a good way to make a lot of money. I went to his house and he offered me to open up a partnership welding shop. He said I would operate the partnership shop and he would steal the work from Crothers. Whatever I needed he would supply covered by Crother's [sic] welding shop. He wanted to take away CN jobs, the customers and buckets from Crothers. He told me from the start he can take some welding machines from Crothers, some tools and material, sign the bill by Crothers and ship to our shop, because had [sic] full control and nobody knows what is going on in the weling [sic] shop.

Those of us in the welding shop have six or seven smoke detectors and Mr. Serise sold them [sic] or gave them [sic] away to his friends. I report this to you not because I am upset for lead-hand but I would just like for you to know what is going on in the welding shop.

West told Paolo that he was making some serious allegations and asked him if he intended to send the letter. Since he had not decided, Paolo asked West not to say anything and West asked Paolo to tell him if he sent it. The meeting ended and in the following week, Paolo's rate of pay was altered to reflect that he was no longer a lead hand. Paolo did send the letter to G. Crothers and Gregory which he dated September 19. West discovered Paolo had sent it from Gregory and proceeded to engage an agency to investigate the allegations contained in the letter. After this investigation, Crothers determined that the allegations against Cereser were not true. We note that this investigation did not include any contact with Paolo.

11. This complaint was not filed until November 28, 1990. The evidence discloses that Paolo did not intend to take any action against Crothers until certain union officials spoke with him concerning the loss of the lead hand position. After discussions with them and with a Ministry of Labour inspector, Paolo decided to pursue a complaint.

12. In large measure, the result in this case depends on whether the Board accepts as true the evidence of Paolo or the evidence of Cereser in some key areas. Paolo says that Cereser, in effect, took away his lead hand position a short while prior to September 13 when he began to allocate the work to the men himself rather than through Paolo. Paolo also claims that during his discussion with Cereser on September 13 when Cereser made his comments about Paolo resigning, Cereser referred to Paolo's health and safety complaints about Cereser and advised Paolo that management had spoken to him about them. Cereser denies that these things occurred. In applying the usual tests to determine credibility, the Board prefers the evidence of Paolo to that of Cereser where the conflicts are material.

13. The Board accepts the evidence of Paolo that Cereser, during their discussion of September 13, told Paolo among other things that he had been too "mouthy" in making complaints concerning Cereser's health and safety performance when suggesting that Paolo resign the lead hand role. Paolo has consistently maintained that Cereser made such a comment and Paolo's position in this regard is not simply something he disclosed recently. On the day after his September 13 discussion with Cereser, and at a time when he appeared to have no intention of complaining about the situation, Paolo prepared the letter addressed to G. Crothers and Gregory in which he makes reference to Cereser's comment of September 13. At the time he wrote the letter, given the circumstances, it is highly improbable that Paolo was being untruthful regarding what Cereser told him in connection with the resignation comment. By accepting Paolo's evidence on this point, the Board is satisfied that Cereser was aware before September 13 of the statements made by Paolo at the training session that were critical of Cereser's handling of health and safety matters. Although

the evidence does not disclose how Cereser discovered what Paolo said at the training session, we are not surprised that such a matter would likely come to his attention, even if not from West.

14. Having found that Cereser was not believable when he testified that he was unaware of Paolo's earlier complaints by mid-September and when he stated that he made no reference to those complaints in his meeting with Paolo on September 13, the Board also cannot believe Cereser when he denies that he altered Paolo's lead hand role. The Board accepts the evidence of Paolo that for a short while before the September 13 discussion, Cereser had in effect taken the lead hand role away from Paolo. This conduct on Cereser's part, along with his comments to Paolo on September 13 about resigning, lead us to conclude that Cereser, as a practical matter, had removed Paolo from the lead hand position shortly before September 13. The Board views Cereser's suggestion to Paolo to resign as an attempt to formalize what in effect had occurred in practice. Paolo did go to West and resign the lead hand position. However, Paolo had little alternative but to resign and such a resignation in the circumstances was not voluntary.

15. Paolo had been in a lead hand position for a long while without any complaint concerning his performance. On August 23, at the training session, he made comments that were critical of Cereser's role in addressing health and safety matters. After conducting his own investigation, Migliazza concluded that some of the concerns of the employees were legitimate and that supervision was at fault to a large extent. This caused Cereser's superior to have a discussion with him concerning his performance with respect to health and safety matters. In reviewing these circumstances and those referred to above, the Board finds that Crothers has not satisfied its onus on the balance of probabilities. The Board cannot be satisfied that Cereser did not penalize Paolo in part because of Paolo's compliance with the *OHSA*. Accordingly, the Board hereby directs Crothers forthwith to reinstate Paolo as a lead hand and to compensate him for his losses.

DECISION OF BOARD MEMBER G. O. SHAMANSKI; November 30, 1990

1. I dissent.

2. On September 14 Paolo had a meeting with Mr. West the Toronto shop manager and at this meeting he resigned his lead hand position with the Company. The evidence is quite clear and unchallenged that when Mr. West asked Paolo on five different occasions during this meeting to reconsider his decision to resign he steadfastly refused to. He further declined to discuss with Mr. West his reasons for resigning his lead hand position. During this meeting Paolo showed Mr. West a letter he had written to G. Crothers and G. Gregory (ref. para. 10 of the majority's decision).

3. West's response to Paolo was that he (Paolo) was making some very serious allegations against Mr. Cereser. Mr. Paolo asked West not to say anything about the letter as he had not yet decided to send it to Gregory or Crothers. West requested if he did decide to send the letter to the gentlemen named that he advise him accordingly. Paolo did in fact send the letter to Crothers and Gregory but did not inform West of his actions. When West became cognizant of this event he proceeded to have the allegations against Cereser investigated and in the final analysis it was determined that Paolo's allegations against Cereser were not true.

4. At this juncture one wonders after reading Paolo's letter with respect to the serious allegations he makes against Cereser just what sort of game is Paolo playing.

5. It would appear that Paolo did not particularly like Cereser and embarked on a course of action to discredit Cereser and make life as miserable as possible for him - to the point of reducing to writing serious allegations of misconduct that had no foundation whatsoever.

6. I cannot accept the majority's rationalization in para. 14 given that Paolo wrote a very damaging letter to the Company regarding Cereser which the Company investigated and found to be untrue. If one concludes that this letter is without foundation one must also conclude that other evidence given by Paolo with respect to this case is at the very least, somewhat suspect and not beyond the realm of fabrication.

7. I am persuaded by the evidence of Cereser that he did not strip Paolo of his lead hand responsibilities nor did he in any way compel Paolo to resign his lead hand position.

8. It should also be noted that the Union did meet with John O'Brien the Company's Personnel Manager sometime around September 18, and through Joe Fletcher the Union representative demanded that the Company discipline Cereser by means of a five day suspension from work without pay and a public acknowledgement of the reason for such action - and the reinstatement of Paolo to his lead hand position with pay. The Company was also informed that their failure to capitulate to the Union's demand would invite action against the Company under Section 24 of the Occupational Health and Safety Act.

9. In my opinion this was an intimidating gesture on the part of the Union and when the Company did not comply with the Union's demand, the Union proceeded with its action under Section 24.

10. In conclusion I am persuaded the Respondent Company did not demote the complainant for seeking enforcement or compliance of the Occupational Health and Safety Act and I would have dismissed this complaint.

1010-89-R; 1240-89-G International Brotherhood of Electrical Workers, Local 353, Applicant v. **Deluxe Electrical Contractor Ltd., Duplex Electrical Ltd., Respondents**; International Brotherhood of Electrical Workers, Local 353, Applicant v. Duplex Electrical Ltd., Deluxe Electrical Contractor Ltd., Respondents

Construction Industry - Related Employer - Sale of a Business - Small electrical contracting business voluntarily recognizing union to obtain journeymen and apprentice electricians - Business failed to obtain any such tradesmen from union and at no time employed anyone other than its sole owner - Owner closing business and becoming partner in another electrical contracting business - Owner selling all assets to new business and receiving additional payment in recognition of experience - New business acquiring benefit of proprietary skills in bid-oriented business - Fact that former business was one person business and unable to get expected tradesmen under collective agreement no reason to refuse sale of business declaration - Circumstances warranting protection of bargaining rights union acquired under voluntary recognition with former business - Board finding sale of business

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *W. Gibson* and *C. A. Ballentine*.

APPEARANCES: *L. Steinberg* and *R. Gill* for the applicant; *James Knight* and *Joe D'Alessandro* for Duplex Electrical Ltd.; *Ray Capretta* for Deluxe Electrical Contractor Ltd.

DECISION OF THE BOARD; November 1, 1990

1. The application in Board File No. 1010-89-R is an application for declarations under subsection 1(4) and section 63 of the *Labour Relations Act*. The applicant seeks a declaration that Duplex Electrical Ltd. ("Duplex") is the successor to Deluxe Electrical Contractor Ltd. ("Deluxe") as a result of a sale of a business within the meaning of section 63 of the *Labour Relations Act* or a declaration that they should be treated as one employer for purposes of the Act because they carry on related activities or businesses under common control or direction within the meaning of subsection 1(4) of the Act. The application in File No. 1240-89-G is the referral under section 124 of the Act of a grievance in the construction industry for final and binding arbitration. The parties agreed that the hearing into that application should be stood down to await the resolution of the application in File No. 1010-89-R.

2. The relevant provisions of the Act respecting the application in File No. 1010-89-R state as follows:

1.-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

63. (1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

3. Ray Capretta is the sole proprietor of Deluxe. He is an electrician by trade and has worked in the trade since 1971 when he began his apprenticeship with G. W. Smith Electrical ("Smith"). He became a member of the applicant in 1976 when it gained bargaining rights for Smith's employees. Capretta left Smith during 1985 and began his own electrical contracting business under the name of Deluxe. He began performing work under that name in November 1985 and incorporated Deluxe in December. He continued to operate the business as an electrical contractor until November 1987 when one of Deluxe's customers went bankrupt owing Deluxe \$15,000.00. Deluxe ceased doing business as an electrical contractor after November 1987, except as noted later in the decision.

4. Deluxe performed primarily small commercial contracts of around \$10,000.00 in value during the two years that it engaged in electrical contracting. It had gross revenues of approximately \$99,600.00 in its first year of business and approximately \$92,000.00 in the second year. Two of its major customers were Pancor Industries and Retail Enterprises, both of which performed work in retail shopping malls. Pancor was unionized and, in order for Deluxe to obtain and perform contracts for Pancor, Capretta signed a voluntary recognition agreement with the appli-

cant in April 1986. The document is not in evidence in these proceedings, but that is an admitted fact. Since Deluxe was doing commercial work at the time, it is reasonable to infer that the bargaining rights acquired by the applicant included the industrial, commercial and institutional (ICI) sector of the construction industry. Therefore, the statutory effect of the voluntary recognition agreement was to bind Deluxe and the applicant to the collective agreement then in effect between the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario, and its successors ("the Agreement").

5. Deluxe began performing work for Retail in 1987 and, when Retail went bankrupt owing Deluxe \$15,000.00 on a \$20,000.00 contract, Capretta decided to close down Deluxe's business and did so in November 1987. A significant additional factor contributing to his decision was the fact that he had been unable to obtain journeymen or apprentice electricians from the applicant and had been working 12 to 14 hours a day six or seven days of the week to perform his contracts. He found that to be risky and to limit the types of jobs Deluxe could undertake. He claimed to have not read the Agreement and to have not understood that he could hire those skills anywhere they could be found if the applicant was unable to supply them within a specified period after Deluxe had made its request.

6. Approximately six months after Capretta started Deluxe, he was approached by Joe D'Alessandro, an acquaintance, for advice about whether D'Alessandro should start his own electrical contracting business. He had been a journeymen electrician for about one year and thought that he might benefit more by working for himself than by being an employee of someone else. Their discussions led to a decision to enter into an equal partnership in which D'Alessandro would run the business and Capretta would provide advice whenever D'Alessandro required it. In addition to his advice, Capretta provided D'Alessandro with an interest free loan of \$4,000.00 from Deluxe. The cheque for the loan proceeds was made out to an automobile agency for the purchase of a van for the new business.

7. D'Alessandro began performing work in the name of Duplex in June 1986. He operated Duplex's business out of his home and its telephone number was his home telephone number. At the outset of business, Duplex used the same bookkeeper and accountant as Deluxe. Duplex took on small residential and commercial contracts of \$1,500.00 to \$2,000.00 in value. D'Alessandro performed all of the work himself. He decided what type of jobs Duplex should pursue without advice from Capretta. He did seek Capretta's advice about matters dealing with the electrical code and, sometimes, how to perform a particular kind of work. Capretta also gave him advice on pricing a couple of jobs and he put D'Alessandro in contact with Dominion Candy and Club Monaco, two of Deluxe's customers, on an occasion when Deluxe was unable to take on work from them. As at April 1987, Duplex's first year end, it had gross revenues of \$87,000.00.

8. Deluxe and Duplex operated parallel businesses as electrical contractors for approximately one and a half years from June 1986 until November 1987, when Deluxe ceased doing business. At that time, Deluxe sold its 1979 van to Duplex for \$2,000.00 and its ladders, drills, conduit benders and some electrical supplies for \$10,500.00. In addition, Duplex made a payment to Deluxe of \$9,600.00 as extra pay for vacation to be taken by Capretta over the next five years because of the greater length of time he has spent in the trade compared with D'Alessandro. Both D'Alessandro and Capretta acknowledged this to be a payment for the expertise which Capretta was bringing to Duplex in the form of his knowledge of the electrical code and of the electrical trade. They denied that it was for his greater experience in pricing and bidding jobs in a competitive bid market. D'Alessandro claimed that he knew how to cost labour from his experience prior to starting his own business. They both pointed out that, when Deluxe was in business, it was bid-

ding jobs of approximately \$10,000.00 in value, whereas, after Capretta began working full-time for Duplex, Duplex was bidding on jobs priced up to \$500,000.00, prices with which Capretta had no prior experience.

9. Capretta and D'Alessandro put up their homes to secure a line of credit for Duplex from the Canadian Imperial Bank of Commerce. Duplex was later able to get a line of credit from another bank without the need of security from Capretta. Capretta did not start working full-time for Duplex until February or March of 1988. At first he just worked at nights with D'Alessandro preparing bids for jobs. When he went to work with the tools, he was paid at an hourly rate, as was D'Alessandro. Capretta took payment either in his own name or by having Deluxe invoice Duplex for his time, depending upon the advice of his accountant. The availability of Capretta to work with D'Alessandro as a journeyman enabled Duplex to go after larger jobs than D'Alessandro was able to handle on his own. Prior to that, D'Alessandro had been unable to hire journeymen electricians to work for Duplex, but with Capretta working with him, Duplex was able to hire and make use of electricians' helpers and apprentices. Shortly after Capretta began working with the tools, Duplex hired two employees and worked with them until September of 1988 when it began hiring additional employees. By June 1989 Duplex had eight employees. At the time of the hearings into this application, four of Duplex's eight employees were journeymen electricians.

10. Once Capretta started to work full-time with Duplex, it began to advertise in the Daily Commercial News and to contact general contractors and builders for opportunities to bid on work. In this manner, Duplex successfully bid on jobs from Go Transit, the Province of Ontario, some municipalities, Woolco Stores and a general contractor who specialized in the construction of service stations. Go Transit, the Province of Ontario and the municipalities together accounted for approximately 60 per cent of its gross revenues, Woolco Stores approximately 25 per cent and the general contractor approximately 15 per cent. For the year ending April 1989, the first full year in which Capretta was working full-time with Duplex, its gross revenues were \$665,275.00, about double of what it had been for the prior year. Duplex got its first opportunity to bid on work for Woolco Stores as a result of a personal contact of Capretta. Woolco had been a major client of Smith and Capretta had spent most of his time while employed with that company working in Woolco stores. Duplex got its first job from Woolco approximately a month after Capretta started working full-time for Duplex.

11. It was Duplex's work for Woolco Stores which brought it to the applicant's attention. Capretta was working on Duplex's first job for Woolco on April 20, 1988 at its store at Sheppard Avenue and Weston Road when Robert Gullins, a business representative of the applicant, called on Capretta. There is no dispute about that being the applicant's first contact with Capretta after he began working full-time with Duplex. The evidence is in conflict, however, respecting whether that was when the applicant became aware of the alleged facts on which this application is based, as the respondents claim, or whether it was in February 1989, as the applicant claims. The Board heard the testimony of Capretta, D'Alessandro and Tom Capretta for the respondents and Robert Gullins and Larry Venning for the applicant. Gullins and Venning were business representatives employed by the applicant. Gullins was employed from October 1987 to October 1988 and Venning from September 12, 1988 to June 9, 1989. The Board has considered their testimony and assessed their credibility as witnesses in accordance with the usual criteria, including what is reasonably probable in the circumstances. The Board is satisfied that the applicant knew by November 1988 the circumstances on which it has relied to make this application.

12. Applicant counsel argued that the foregoing facts bring its bargaining rights with respect to Deluxe within the protection of both subsection 1(4) and section 63 of the Act. Counsel for

Duplex argued that the facts do not support a finding that Duplex is either a related or a successor employer to Deluxe within the meaning of those sections.

13. Counsel for Duplex argued the following reasons why the Board should not find Duplex to be the successor employer to Deluxe as a result of a sale of its business, or part of it, to Duplex. Nothing but a few assets have passed from Deluxe to Duplex and they were not its business or a part of its business. Nor was Capretta's transfer to Duplex a situation where the owner of an active company for whose employees a trade union has bargaining rights went over to a key position in another company. Rather, it was a situation in which Capretta simply decided to put Deluxe on the shelf and to go to work for Duplex because the applicant failed to fulfill his request for the journeymen and apprentice electricians which he needed in order to perform Deluxe's contracts. In addition, Deluxe had been a one-person show, and had employed only Capretta, its owner. That makes the entire fact situation unique because the purpose of section 63 is to protect a union's bargaining rights for employees. Since there never had been any Deluxe employees for the applicant to represent there was nothing to protect and no need for the Board to give section 63 the liberal interpretation asked for by applicant counsel in order to find a section 63 sale of a business. In that respect, counsel pointed out to the Board that applicant counsel had not referred to any Board jurisprudence involving businesses which were a one person operation even though he was arguing that the facts of this application fit comfortably with the principles of the Board's jurisprudence dealing with section 63 applications. Finally, Duplex counsel argued that, were the Board to find a section 63 sale of Deluxe's business to Duplex, that result would be tantamount to telling Capretta that there were only two choices for him after shutting down Deluxe: become someone else's employee, or start another unionized business. Counsel contends that would be a result not required by the statute.

14. With respect to the applicant's request for a "one employer" declaration under subsection 1(4) of the Act, Duplex counsel submitted that the circumstances do not warrant such a declaration even were the Board to find that it had the discretion to make it. That, according to counsel, is because there is no good labour relations purpose to be served by making a declaration and, to do so, would have the effect of extending the applicant's bargaining rights from a company where the applicant has never had any of its members employed to a company whose employees it has never attempted to organize and some of whom it may not even want as members because they are neither journeymen nor apprentice electricians.

15. The Board is of the view that it need not decide whether it has the discretion under subsection 1(4) of the Act to issue a one employer declaration. In the Board's opinion, the facts support the conclusion that there has been a sale of Deluxe's business, or part of it, to Duplex, a company in which Capretta and D'Alessandro are equal partners.

16. Section 63 is in the Act to preserve bargaining rights and to protect the collective bargaining status quo. With that purpose in mind, the Board has given a liberal rather than narrow interpretation to the definition of sale of a business in subsection 63(1) of the Act. See *Stucor Construction Ltd.*, [1987] OLRB Rep. April 614, at paragraph 16. The Board must answer two questions when deciding whether there has been a sale of a business under section 63. The first question is whether there has been a sale within the statutory definition of the word. The second question is whether what has been sold constitutes a business or part of a business. In this respect see the Board's decision in *The Tatham Company Limited*, [1980] OLRB Rep. Mar. 366, paragraph 22. In the case at hand, there is no doubt that there has been a sale; all of Deluxe's tangible assets were sold to Duplex. A short while later, Duplex also acquired the services of Capretta, D'Alessandro's equal partner in Duplex, and paid Deluxe \$9,600.00. The Board finds that payment to have been made in recognition of Capretta's greater experience in the electrical trade. The more difficult

question is whether, by means of those transactions, Deluxe's business or part of it transferred to Duplex.

17. Deluxe and Duplex operated parallel electrical contracting businesses for approximately one and a half years while Capretta and D'Alessandro were equal partners in Duplex. When Capretta decided that he no longer wanted to engage in that type of business through Deluxe, he sold immediately to Duplex the tangible assets which had been used for the conduct of Deluxe's business. Approximately three months later, Duplex also acquired Capretta and with him his eighteen years experience in the electrical trade, along with the experience he acquired in running Deluxe's business. Duplex recognized the importance of that experience to it by paying Deluxe \$9,600.00. D'Alessandro testified that it was simply Capretta's availability to Duplex as a journeyman electrician that enabled Duplex to expand its business as quickly as it did, and not any expertise in bidding electrical work or his experience in the trade. It is noteworthy, however, that Capretta's first work for Duplex after joining it full-time in February 1988 was preparing bids together with D'Alessandro. There is no doubt that the trades skills which Capretta brought to Duplex could have been provided by any journeyman electrician of similar experience and skill. The extra benefit which Duplex got from Capretta, however, was his experience in applying those skills as a proprietor of a business which operated in a bid-oriented market. Most of the work which Deluxe had performed had been acquired on the basis of competitive bidding. Once Capretta joined Duplex, it began to compete successfully for work in a bid-oriented market. The degree of its success may be seen in the doubling of Duplex's sales revenues in its first complete year of business after Capretta joined Duplex.

18. The Board has commented before on the significance of management expertise in bid-oriented divisions of the construction industry. The Board put it this way in *Construction P.H. Grager Inc.*, [1985] OLRB Rep. Feb. 233 at paragraph 10:

..., the essence of a 'business' in a bid-oriented sector of the construction industry frequently resides in the experience and expertise of its management personnel, rather than, for example, in the physical assets such as tools or a specific location.

Furthermore, as the Board noted in *Stucor, supra*, that expertise is essential not just for bidding and pricing jobs, but also for executing the acquired jobs within the cost constraints of the bid. Capretta and D'Alessandro both played down Capretta's contribution in that respect, both in his advice giving capacity while he was still carrying on business as Deluxe as well as after he moved over to Duplex. It is to be noted, however, that D'Alessandro came to Capretta at Deluxe whenever he needed advice about the electrical code or about performing electrical work with which he was not experienced. That knowledge is important to both bidding and executing work and it was part of the experience for which Duplex paid \$9,600.00 to Deluxe. At that point, Duplex already had bought all of Deluxe's tangible assets and, with the addition of Capretta, all of the significant resources which Deluxe had used to carry on business as an electrical contractor.

19. Whether or not this fact situation is unique, as Duplex counsel suggests, because Deluxe was a one person business, the Board still must apply section 63 to those facts. Even Duplex counsel did not suggest that section 63 did not apply to such businesses, but he did argue that the Board should not give section 63 too liberal an interpretation when applying it to this fact situation. The Board recognizes the need to be sensitive to the business context in which it is asked to apply the section as well as to the purpose of the section. That recognition was clearly and succinctly reflected in the following observations at paragraph 26 of *Tatham, supra*:

• • •

The issue of employer successorship arises out of a seemingly endless variety of factual settings,

with each new case presenting some of the factors considered relevant to the resolution of prior cases while raising other materially altered, entirely omitted, or newly-added facts which arguably should affect the decision on the merits. Much of the confusion which attends successorship results from the facility with which each case can be distinguished on its facts from all former cases; but to dismiss the confusion so lightly would be to disregard the fundamental differences inherent in the various business contexts in which the successorship issue arises. Factors which may be sufficient to support a "sale of business" finding in one sector of the economy may be insufficient in another. In some industries, particular configuration of assets - physical plant machinery and equipment - may be of paramount importance; while in others it may be patents, "know-how", technological expertise or managerial skills which will be significant. Some businesses will rely heavily on the goodwill associated with a particular location, company name, product name or logo; while for other businesses, these factors will be insignificant. *The Labour Relations Act applies equally to primary resource industries, manufacturing, the retail and service sector, the construction industry and certain public services provided by municipalities and local authorities. In each of these sectors the nature of the business organization is different, yet in each case section 55 [now section 63] must be applied in a manner which is sensitive to both the business context and the purpose which the section is intended to accomplish.*

[emphasis added]

20. When Deluxe found itself in the position where it had to be a "unionized" contractor in order to perform work for Pancor, Capretta found it convenient to enter into a voluntary recognition with the applicant. That agreement recognized the applicant as the exclusive bargaining agent for any journeymen and apprentice electricians employed by Duplex and bound the applicant and Duplex to the Agreement. Clearly Capretta expected that any journeymen and apprentice electricians which Deluxe might require would be obtained through the applicant under the terms of the Agreement. It was not for lack of need that Deluxe had no journeymen or apprentice electricians other than Capretta. Deluxe's inability to get them from the applicant was a significant factor in Capretta's decision to close Deluxe. In those circumstances, the fact that Duplex did not at any time employ journeymen or apprentice electricians under the Agreement is not reason for the Board to give a restrictive reading to section 63 when applying it to the facts at hand. It is undisputed that Deluxe was still bound to the Agreement when its tangible assets and Capretta, everything with which Deluxe had carried on the business of an electrical contractor, were transferred to Duplex and were used in its electrical contracting business, a business in which Capretta was an equal partner from its start. With the acquisition of Capretta, Duplex substantially bolstered its capability to bid and execute successfully contracts acquired in a bid-oriented division of the construction industry. In the Board's view, these circumstances warrant protecting the bargaining rights which the applicant acquired when it signed the voluntary recognition agreement with Deluxe binding them to the Agreement and also make it appropriate to find that Deluxe's business continues in Duplex and, as a result, there has been a sale of Deluxe's business to Duplex within the meaning of section 63 of the *Labour Relations Act*.

21. In the result, as at the date of the sale, Duplex became bound to the collective agreement between the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario effective May 24, 1988 to April 30, 1990. Since the applicant was relying on subsection 1(4) of the Act in the alternative, the Board considers it unnecessary to decide whether it has the discretion to make a one employer declaration and, if so, whether it ought to make such a declaration. Therefore, insofar as this application relates to subsection 1(4) it is dismissed. The application in File No. 1240-89-G may be brought on for hearing at the written request of any of the parties to the application.

0723-89-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. Maple Engineering & Construction Canada Ltd., Respondent v. Christian Labour Association of Canada, Intervener

Evidence - Practice and Procedure - Objections to conduct in inquiry before Labour Relations Officer to be dealt with in accordance with Practice Note #4 - Questions put to witness at inquiry not improper merely because they raise an issue of credibility

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. Gibson* and *C. A. Ballantine*.

DECISION OF THE BOARD; November 7, 1990

1. By letter dated October 30th, 1990, the intervener, Christian Labour Association of Canada has written to the Board as follows:

We hereby confirm our objection raised during the examinations held on October 29, 1990, while Mr. J. Woszynski, counsel for the Applicant, cross examined witness Ken Kelp.

Mr. Woszynski put questions to this witness which clearly conveyed that there exists earlier testimony which is different from, if not contrary to the witness' recollection. Mr. Woszynski did this by such statement as "we heard from Jim Zettel that he was working as a signalman" and "Mr. Zettel testified he was guiding concrete" and "Mr. Zettel testified you were---".

It is our position that Mr. Woszynski's questioning was improper since the "testimony" referred to no longer exists, since no transcript will be made of the tapes recorded during the examination of Mr. Jim Zettel because the Applicant has conceded that Mr. Jim Zettel is in fact a labourer.

The Board will, therefore, be unable to compare Mr. Kelp's testimony with any statements made by Mr. Jim Zettel.

It is our position that the Applicant's questions cast doubt on Mr. Kelp's integrity and the accuracy of his statements, and should not be allowed.

Sincerely,

"H. Kuntz"

Hank Kuntz

2. It does not appear that the intervener is seeking any direction or ruling from the Board.

3. Even if it was, its letter does not, in our view, reveal any basis upon which it would be appropriate for the Board to intervene in the inquiry being conducted by the Labour Relations Officer in this matter. As the Board observed in *Strongland Construction Ltd.*, [1987] OLRB Rep. Oct. 1330:

3. ... Board Practice Note #4 provides an adequate mechanism for dealing with the concerns raised by the respondent in this case, and it would not be appropriate for the Board to depart from its usual practice in such matters in either of the ways suggested by it. To accede to the respondent's request would be to invite objections and requests for rulings which would ultimately serve to do little more than cause further delays in the certification process. The appropriate time for the Board to deal with such matters is after it has received the Labour Relations Officer's report and the submissions of the parties with respect thereto. Accordingly, the respondent's request is denied and the Board Officer is directed to continue with his enquiry.

(and see *Kaneff Properties Limited*, [1980] OLRB Rep. Nov. 1653).

4. Further, the credibility of a person who testifies in the course of an enquiry conducted by a Labour Relations Officer pursuant to Board authorization may properly be put in issue. If it is, it must, like any other issue, be determined on the basis of the material before the Board. Accordingly, questions will not generally be found to be improper *merely* because they may raise an issue of credibility (see *Dunmark Electric (Ancaster) Limited*, [1988] OLRB Rep. May 489, *Jasper Construction* (Board File No. 2227-86-R, December 17, 1986, unreported)).

3043-89-R Ubaldo Marcheschi on his own behalf and on behalf of a group of employees, Applicant v. International Union of Operating Engineers, Local 793, Respondent v. **Ottawa Greenbelt Construction Limited**, Intervener

Construction Industry - Termination - Union arguing application should be dismissed because four of five employees at work on application date were recalled contrary to collective agreement and therefore unlawfully at work - Employees not referred to union hall before recall - Employer not altering layoff and recall procedure - No evidence of union ever grieving failure to refer to union before recall - Same five employees would have been at work on application date whether or not agreement complied with - Employer not manipulating recall to assist termination application - Board directing representation vote

BEFORE: N. B. Satterfield, Vice-Chair, and Board Members M. Rozenberg and A. Hershkovitz.

APPEARANCES: George Rontiris and Ubaldo Marcheschi for the applicant; Gary Caroline, Len Budge and Rick Kerr for the respondent; W. T. Langley, Natale Giust and B. Ingmundson for the intervener.

DECISION OF THE BOARD; November 19, 1990

1. Ubaldo Marcheschi, has applied under subsection 57(2) of the *Labour Relations Act* for a declaration that the respondent trade union (hereafter "the respondent" or "the union") no longer represents the employees of Ottawa Greenbelt Construction Limited (hereafter "the employer") for whom it is the bargaining agent. Generally speaking, these are the employees of the employer engaged in the operation of heavy construction equipment and those engaged primarily in the repairing and maintaining of that equipment. The parties agree that the application is timely and the Board so finds.

2. The application raises two issues in addition to the usual matters arising out of and incidental to any application made under subsection 57(2) of the Act. One issue was whether a representation vote, if taken amongst employees who were in a bargaining unit which excluded the industrial, commercial and institutional ("ICI") sector of the construction industry, could affect the union's bargaining rights in that sector. The other issue was about an allegation that certain persons were at work on the date of making of the application in contravention of the collective agreement to which the employer and the union were bound and the effect that would have on the application if the allegation were proven true. The issues were raised as preliminary issues, but the Board ruled that it would decide those issues in the appropriate order after receiving the evidence and hearing final argument on all issues arising out of and incidental to the application.

3. Certificates were issued to the union on December 21, 1987 under subsection 144(2) of the Act for the employer's employees who operated and maintained heavy construction equipment. One certificate was for all such employees in the ICI sector of the construction industry in the Province of Ontario. The other was for all such employees in all other sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell ("Board area #15"). As a result of the certificate for the ICI sector, the union and the employer became bound immediately by operation of subsection 145(4) of the Act to the provincial agreement then in effect between the designated employee bargaining agency for operating engineers and the designated employer bargaining agency for the employers for whose employees the respondent holds bargaining rights in the ICI sector. The certificate with respect to all other sectors of the construction industry in Board area #15 did not have a similar effect. That certificate obligated the employer and the union to bargain in good faith and make every reasonable effort to conclude a collective agreement for those sectors.

4. The parties agree that the employer became bound to a collective agreement which was in effect from May 1, 1988 to April 30, 1990 between the National Capital Road Builders Association ("the Association") and a council of trade unions representing, amongst others, the respondent ("the Agreement"), but the evidence does not reveal precisely when the employer became bound. A business representative of the respondent testified that the union did not have a collective agreement with the employer in 1988. If he knew when the union and employer first became bound to a collective agreement he did not say. The employer was making contributions to the union's health plan and pension plan and deducting union dues from employees at the rates called for by the Agreement in November and December, 1989. There is also evidence which suggests that the employer honoured authorizations for the deduction of union dues from employees' pay and was contributing to the health and welfare plans well prior to November and December 1989. The Association is an accredited employers' organization and has exclusive bargaining rights for employers of employees for whom the union has bargaining rights in the heavy engineering, roads and sewers and watermains sectors of the construction industry in Board area #15. It became accredited for those sectors during the term of the Agreement. That was on January 17, 1989, a little more than two years after the union was certified to represent the employer's operators and maintainers of heavy equipment. If the employer and the union had not yet entered into a collective agreement by January 17, 1989, they would have become bound to the Agreement on that date by operation of subsection 129(2) of the Act. If they had been bound to the predecessor collective agreement to the Agreement they would have become bound by the Agreement on its effective date, May 1, 1988. On the other hand, if they had been bound to some other collective agreement which expired after May 1, 1988, they would have become bound to the Agreement pursuant to subsection 127(2) of the Act upon expiry of the other agreement.

5. The parties agree that the employees of the employer for whom the union has bargaining rights who were at work on the date of making of this application were not working in the ICI sector of the construction industry on that date. They agree further that the employees who were at work on the date of making of this application were working in the bargaining unit described below:

all employees of the employer engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the roads, sewers and watermains and heavy engineering sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell.

6. In spite of that agreement of the parties, the two issues referred to at paragraph 2 above

impact on the respondent's bargaining rights in the ICI sector. With respect to the first issue, counsel for the applicant took the position that, even though it was admitted that none of the employer's employees were at work in the ICI sector of the construction industry on the date of making of this application, should the Board direct that a representation vote be taken and a majority of the employees vote to terminate the union's bargaining rights, the effect of that vote should be to terminate all of the respondent's bargaining rights for the employer's employees. That is, the result should be to terminate the union's bargaining rights under the provincial agreement as well as its bargaining rights in the unit described above. With respect to the second issue, counsel for the union contended that the employees who were at work on the date of making of the application were either hired contrary to the terms of the provincial agreement (for the ICI sector) or were recalled following layoff contrary to the terms of the Agreement and, therefore, should not be treated by the Board as being at work in any unit of employees affected by this application.

7. The Board will deal first with the issue of what bargaining rights would be terminated in the event that the Board directs the taking of a representation vote and a majority of the eligible voters who cast ballots vote to terminate the union's bargaining rights. The thrust of applicant counsel's argument that a successful vote should result in the termination of the union's bargaining rights in the ICI sector of the construction industry in the Province of Ontario, as well as in all other sectors in Board area #15, is related to how a trade union gets certified under section 144(2) of the Act. When, as with the union herein, a union is certified under section 144(2), it receives two certificates, one for the ICI sector and another for all other sectors, regardless of which sector employees were actually working in on the date of application. In other words, for a certificate to issue to a trade union for the ICI sector it is unnecessary that the employees actually be working in that sector on the date of application. The reasons why this is so are explained in the Board's decision in *Colonist Homes Limited*, [1980] OLRB Rep. Dec. 1729. Applicant counsel argues that, if a trade union can get certified in the ICI sector even though the employer has no employees working in that sector at the time the application for certification is made, the same principle should apply when it comes to terminating bargaining rights in the construction industry. That is, counsel argues, the Board should follow the same process for the acquisition and termination of bargaining rights, and the process for terminating bargaining rights should not be dependent upon the sector or sectors in which the employees were working at the time the termination application was made.

8. This same argument was canvassed at length in the Board's decision in *Fred Jantz Masonry Construction Company Limited*, [1986] OLRB Rep. Aug. 1083. In that case, an application for termination of bargaining rights was made at a time when employees of the employer were working in sectors other than the ICI sector. The trade union held bargaining rights in the ICI sector under a provincial agreement, but there was no agreement covering employees of the employer working outside of that sector. The Board concluded that an application could be brought by those employees only for the bargaining rights outside of the ICI sector and they were not entitled to bring an application to terminate the ICI bargaining rights. The employer's argument is set out at paragraph 24 of the decision and the Board's reasons for its conclusions are set out in paragraphs 25 and 26. Those reasons are wholly applicable to the circumstances of this application and the Board herein adopts them as its own. Accordingly, the Board finds that there were no employees who were entitled to bring an application for termination of bargaining rights in the ICI sector of the construction industry on the date of making of this application, but that it was properly brought on behalf of employees who were entitled to bring an application for termination of bargaining rights in respect of all other sectors of the construction industry in Board area #15. Only those latter bargaining rights can be affected by a representation vote if one is taken.

9. The Board turns now to the issue of the effect on the application of the allegation that employees affected by it had been hired or recalled from lay-off contrary to the collective agree-

ments binding on the employer. In view of the Board's conclusion that this application cannot affect the bargaining rights in the ICI sector and, further, since the employees who were at work on the date of making of this application were not working in that sector, the question of whether any employees were hired contrary to the provincial agreement is not relevant to this application. Therefore, the only issue is whether the employees who were at work on the application date were recalled to work following a lay-off contrary to the provisions of the Agreement. Clause 3.5 of the Agreement provides that an employer shall refer present employees to the union office before recalling them to work after a seasonal lay-off. Clause 11.1(b) provides that, amongst other things, in lay-offs and recalls from lay-off, the length of continuous service with the employer shall prevail if capability, competence and performance are otherwise approximately equal.

10. The parties to this application agree that there were five employees at work for the employer on the date of making of the application. It is the position of union counsel that only one of the five employees was recalled in compliance with the Agreement and that was Glen Stephens who was the last of the five employees to be recalled and the most junior of them in terms of continuous service with the employer. Union counsel claims that he was the only one of the five who was cleared through the union office before being recalled. It is admitted that the other four were not referred to the union office before being recalled to work. One of the four, a son of the owner of the employer, continued to work from time to time during the term of the lay-off, although it is unclear whether he was working in the bargaining unit. He has less continuous service than the other three employees and, if he was working in the bargaining unit while they were on lay-off, the employer was in breach of clause 11.1(b) of the Agreement. If he was not working in the bargaining unit, he was on a *de facto* lay-off and was not referred to the union office before he resumed working in the bargaining unit. He also resumed work before the other three employees even though he had less continuous service than them.

11. The applicant was one of the four employees and union counsel argues that he was not eligible to bring this application because he was not lawfully at work in the bargaining unit on the date of making of the application because the employer did not comply with clause 3.5 of the Agreement when he was recalled to work. Union counsel argues that Stephens was the only person who could have brought it and clearly he is not the applicant. Furthermore, counsel argues that the applicant could not rely on the support of any of the other employees who were unlawfully at work on the date of making of the application. In this respect, counsel relies on the Board's decision in *April Waterproofing Limited*, [1980] OLRB Rep. Nov. 1577.

12. In that case, a trade union had applied for certification to represent certain employees of an employer for whom a rival trade union was the bargaining agent. Immediately before the application was made, the employer had hired the persons on whose membership support the applicant relied for certification. They had been hired contrary to the hiring provisions of the collective agreement to which the employer and the incumbent trade union were bound. The Board reasoned that the applicant should not be permitted to benefit and the incumbent should not be prejudiced as a result of the fact that the employees were in the bargaining unit because of the employer's violation of the collective agreement. Therefore, the Board concluded that the employees hired contrary to the collective agreement should not be treated as being employed in the bargaining unit for purposes of the certification provisions of the Act. Counsel for the union in the instant case takes the same position with respect to section 57 of the Act and the four employees who were recalled, or in the case of one of them retained, contrary to the Agreement.

13. Three of the four employees challenged by union counsel, including the applicant, have been employees of the employer since approximately 1980 and 1981, well before the employer became unionized. Two of them are long time union members. The fourth one was the son of the

owner. He first began working full-time for the employer in February or March of 1988, although he had worked during school vacations prior to that. The four were laid off at the end of the 1989 construction season and recalled at the start of the 1990 season in the same manner as they had been at the end of the 1988 season and the start of the 1989 season with the employer. For the three employees with longer continuous service than the son of the employer, there was no difference in the way in which they were laid off and recalled in other seasons whether before or after the employer became unionized. Stephens was hired only in September, 1989 so this was his first construction season with the employer.

14. The employer clearly did not alter its procedure for laying off employees at the end of the construction season and recalling them at the start of the next season after it became unionized, although by continuing its practice, the employer might have breached clause 3.5 by not referring employees to the union office before recalling them, and clause 11.1(b) by retaining or recalling the owner's son out of order. The Board notes that the union's business representative was unaware of the union ever having brought a grievance against an employer who had failed to refer employees to the union's office before recalling them from lay-off. Even if the employer has breached the agreement, on the evidence before the Board, it cannot reasonably be said that the employer manipulated its recall and/or retention of employees in 1990 in order to assist an application for termination of bargaining rights. What is more significant is that the same five employees would have been at work on the date of making of the application whether the employer was in breach of the Agreement or in strict compliance with it. At worst, strict compliance would have altered the order in which the employer's son was recalled relative to one of the other three employees. There is no evidence, nor is it alleged, that any of the four employees were recalled ahead of others who were entitled to recall before them. All four of those employees were recalled to work well before the making of the application and well before the applicant began to solicit support for the application. Therefore, this application has not enjoyed any advantage from the manner in which the five employees who were at work on the date of making of the application came to be at work. These circumstances simply do not raise any of the concerns which attracted the Board's attention in *April Waterproofing* and, in the view of this panel of the Board, they do not warrant adopting the approach of the Board in that case.

15. When an application has been made under subsection 57(2) of the Act, before the Board can direct the taking of a representation vote (in this case a vote of the employees in the bargaining unit described at paragraph 5 above) subsection 57(3) requires the Board to ascertain the number of employees in the unit at the time the application was made and whether or not less than forty-five per cent of them have voluntarily signified that they no longer wish to be represented by the union. It states:

57.-(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as it determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

16. Ubaldo Marcheschi testified as to the origin, preparation and circulation of the petition filed in support of this application. His evidence was uncontradicted and the Board found him to be a credible witness. There is nothing in the manner in which the petition was prepared, circulated and filed with the Board which would cause the Board to believe that it was likely to have come to the attention of the employer before it was signed or that the employees might have signed the petition because they believed that the employer would learn whether they had signed it. The

union called evidence which it argued should cause the Board to conclude that the employer was behind the petition and was known to the employees to be behind it. Having assessed that evidence along with all of the evidence about the origin, preparation and circulation of the petition and considered the submissions of the parties thereon, the Board's view of that evidence is quite different than that of union counsel. The Board would not be prepared to infer that the employer even had knowledge of the petition prior to the making of this application. Therefore, having regard to all of the evidence before it, the Board is satisfied that the employees who signed the petition are expressing their voluntary wishes not to be represented any longer by the union.

17. In the result, the Board is further satisfied that not less than forty-five per cent of the employees of Ottawa Greenbelt Construction Limited in the bargaining unit at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent trade union on May 8, 1990, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union under section 57(3) of the said Act.

18. The Board directs that a representation vote be taken of the employees of Ottawa Greenbelt Construction Limited in the following bargaining unit:

all employees of the employer engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the roads, sewers and watermains and heavy engineering sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell.

All those employed in that bargaining unit on the date hereof who are so employed on the date the vote is taken will be eligible to vote.

19. Voters will be asked to indicate whether they wish to be represented by the International Union of Operating Engineers, Local 793 in their employment relations with Ottawa Greenbelt Construction Limited.

20. The matter is referred to the Registrar.

1748-90-R Hospitality, Commercial and Service Employees Union, Local 73 of the Hotel Employees and Restaurant Employees International Union, Applicant v. Quetico Centre, Respondent

Certification - Certification Where Act Contravened - Charter of Rights and Freedoms - Trade Union Status - Union constitution denying office to any person associated with or supporting certain subversive organizations - Employer arguing provision contravening *Charter* and should lead Board to deny union status - Constitutional provision not applied in Canada - Focus of inquiry is whether prohibited discrimination exists in practice and not merely whether allegedly discriminating provision present in union constitution - Board finding trade union status - Certificate issuing

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *W. H. Wightman* and *E. G. Theobald*.

APPEARANCES: *W. Dubinsky*, *Don Campbell* and *Tom Rees* for the applicant; *G. L. Firman* and *Linda Wiens* for the respondent.

DECISION OF THE BOARD; November 14, 1990

1. This is an application for certification in which the parties met with a Labour Relations Officer on November 1, 1990, reached agreement on most matters in dispute between them and further agreed to waive their right to a formal hearing in the matter at that time, except to the extent it was necessary to determine whether the applicant is a trade union. A hearing for this later purpose was held in Thunder Bay on November 8, 1990. The evidence before us on the status issue consists of the evidence of two witnesses called by the applicant. Counsel for the respondent argues that the Board should not find the applicant to be a trade union.

2. The Hotel Employees and Restaurant Employees International Union (the "International") has been found by the Board in a previous proceeding to be a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. (See *Food Corp. Limited*, [1983] OLRB Rep. May 636.) Up until this year, Local 75 of the International, which is centred in Toronto, had geographical jurisdiction in the area of Thunder Bay and vicinity. Complaints regarding poor service and demands for local autonomy from its Thunder Bay members led the International in 1990 to establish the applicant.

3. After some discussion about the creation of a new local in northwestern Ontario, D. Campbell, the acting President and representative of the applicant, and T. Rees, an International Organizer, held a meeting in Thunder Bay on August 10, 1990 in order to discuss the issue with the Thunder Bay members. During the relevant period, Local 75 represented less than one hundred members in a handful of bargaining units. Campbell verbally contacted the stewards in the bargaining units and asked them to spread the word about the meeting, with the result that nine persons attended the August 10 meeting. At the meeting, a motion was passed to apply to the International for a charter.

4. Campbell then circulated a petition among members employed in the two largest bargaining units in Thunder Bay requesting the International to issue a charter for a local union for northwestern Ontario. Thirty-two persons, all members of Local 75, signed the petition. Campbell sent the petition to Rees who sent it to the International, along with a payment of \$50.00. On September 1, 1990, the President of the International, with the approval of the General Executive Board, issued a charter to the applicant. On September 14, 1990, the applicant held a meeting at Thunder Bay which 30 persons attended. The charter was accepted at the meeting, the Internation-

al's Constitution was adopted and it was decided that members of Local 75 be accepted as members of Local 73 without the need of paying an initiation fee or making a new application to become a member. Acting officers were selected and Campbell was appointed as the applicant's representative.

5. Section 1 of Article XI of the International's Constitution provides as follows:

ARTICLE XI-LOCAL UNIONS

Section 1. Issuance of Charters. Twenty-five or more persons may apply to the International Union for a charter of affiliation as a Local Union. The application shall be accompanied by a remittance of Fifty (\$50.00) Dollars. Upon approval of the General Executive Board, the charter may be granted.

6. Counsel for the respondent raised four matters in argument. First, he argued that the manner in which notice was given for the August 10 meeting which was poorly attended is inconsistent with basic democratic principles. Conceding that the International's Constitution did not address the issue, counsel contended that the notice given to Local 75 members of the August 10 meeting was not adequate. Second, counsel argued that explicit in the requirement of the \$50.00 payment in Section 1 of Article XI is that those petitioning for a local union pay the \$50.00. Since they did not pay the money here but had it paid on their behalf, counsel maintained that the relevant provision of the Constitution had not been complied with. Third, counsel referred to Section 13 of Article XIII which in essence provides that no person shall be eligible for any office in the union if such persons become associated with or lend support to certain subversive organizations specified in the Article. Counsel maintains that such a provision contravenes the *Canadian Charter of Rights and Freedoms* and therefore should lead the Board to conclude that the applicant is not a trade union. Fourth, counsel referred to the objects clause of the International's Constitution and argued that it is ambiguous and does not meet the Board's standard.

7. Having carefully reviewed the evidence and the parties' submissions, the Board finds that the Hospitality, Commercial and Service Employees Union, Local 73 of the Hotel Employees and Restaurant Employees is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

8. The situation before us is one in which the International, an entity with status as a trade union, has created a new local union, namely Local 73. The Board is satisfied that in creating Local 73, there has been compliance with the International's Constitution. The charter was issued after more than twenty-five persons applied to the International for a charter. The Board notes that Article XI, Section 1 does not require that those persons applying be members of the trade union or that a meeting be held prior to an application being made. Since it was not necessary to have had the meeting of August 10, 1990, the way in which notice was given of the meeting is of no concern. In any event, we are satisfied that Campbell did not act unreasonably in the circumstances in his efforts to notify Local 75 members of the August 10 meeting. In our view, Section 1 of Article XI does not require the \$50.00 payment be made by those persons applying for the charter. The analogy counsel attempted to make between the \$50.00 payment and the minimum payment provided for in the Act's definition of membership is not applicable.

9. A provision such as Article 13 may have consequences as a result of section 13 of the Act but strictly speaking does not impact on the issue of trade union status. The fact that it may discriminate in a manner prohibited by the *Canadian Charter of Rights and Freedoms* does not mean that Local 73 fails to satisfy the Act's definition of "trade union". Although it was not argued that section 13 of the Act would prevent the Board from certifying the applicant given Section 13 of Article XIII of the International's Constitution, the Board finds it would not prevent certifica-

tion in this case. The evidence of Mr. Rees is that this constitutional provision is not applied in Canada. As the Board has noted in previous decisions, such a constitutional provision would not deprive an entity of a certificate where the practice has been not to apply the particular provision. The focus of a section 13 inquiry is to determine whether prohibited discrimination exists in practice and not merely whether a particular constitutional provision of the sort before us is present. In reviewing the objects clause of the International's Constitution, as well as the document as a whole, the Board is satisfied that the applicant was formed for purposes which include labour relations.

10. In summary, the Board is satisfied that the applicant was issued a charter in accordance with the International's Constitution, that it accepted and adopted the Constitution, that it has members and officers and that one of its purposes includes labour relations. The applicant clearly meets the definition of "trade union" in the Act.

11. Having regard to the agreement of the parties, the Board finds that all employees of the respondent in the District of Rainy River, save and except supervisors, persons above the rank of supervisor, and office staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

12. The parties are in dispute as to whether Pat Thorson and Margret Walshe are employed in the bargaining unit. The applicant contends that they are so employed, while the respondent argues that these two persons exercise managerial functions. The Board hereby appoints a Labour Relations Officer to inquire into and report back to the Board concerning the duties and responsibilities of the two persons in dispute.

13. The Board has determined, however, that the applicant's right to certification cannot be affected by the Board's ultimate decision regarding the above. On the basis of all the evidence before it, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on October 19, 1990, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

14. Accordingly, the Board, pursuant to its discretion under section 6(2) of the Act, certifies the applicant on an interim basis as the bargaining agent for the bargaining unit as described in paragraph 11 above.

15. A formal certificate must await the final resolution of the dispute concerning the composition of the bargaining unit.

1051-90-U Kevin Reed, Complainant v. International Sheet Metal Workers Local 540, Respondent v. S.W. Fleming Limited, Intervener

Duty of Fair Representation - Complainant alleging union failed to process his grievance to arbitration - Union displaced by rival union before grievance process exhausted - Fair representation duty expiring with bargaining rights - Union conduct after date of displacement not subject to duty - Complaint dismissed

BEFORE: *Janice Johnston*, Vice-Chair, and Board Members *R. M. Sloan* and *E. G. Theobald*.

APPEARANCES: *Kevin Reed* on his own behalf; *Phil Publow* for the respondent; *Frances Gallop*, *Jim Fleming*, and *Steve Amygdalidis* for the intervener.

DECISION OF THE BOARD; October 31, 1990

1. The style of cause is hereby amended by adding S.W. Fleming Limited (the "company") as an intervener.

2. This is a complaint filed under section 89 alleging a breach of section 68 of the *Labour Relations Act* (the "Act"). Section 68 provides that:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

3. The complainant in this case is alleging that the International Sheet Metal Workers Local 540 ("Local 540") breached section 68 when it failed to process his grievance to arbitration. The grievance dealt with the complainant's lay-off on February 12, 1990 and it was his position that the lay-off was improper. Article 15.03 of the collective agreement in force at the time of the lay-off says:

15.03 In all cases of decrease or increase in the working force, the principle of departmental seniority shall apply with regard to each employee having seniority of one (1) year or less and after such time the principle of plant seniority shall apply provided that in each case the employee to be retained or rehired or transferred by reason thereof has satisfactory ability to perform the work required or available.

The complainant maintained that he should have been able to bump an individual named Joe Rashed who was performing work that he felt he could do. The complainant was laid off from February 12, 1990 to April 15, 1990.

4. The facts of this case are not in dispute. The complainant was laid off on February 12, 1990 and given three days pay. That evening he attended a Local 540 meeting and spoke to the union business representative Phil Publow and the Chief Steward Carl McKenzie about filing a grievance. Local 540 agreed to file a grievance on his behalf and in fact Phil Publow indicated that he felt the complainant had a good case. The grievance was filed with the company the next day by Carl MacKenzie.

5. It was the evidence of Phil Publow that Local 540 followed the grievance procedure and carried the grievance to Step "C" of the process. Article 8 in the collective agreement sets out the grievance procedure and it states:

- 8:01 It is the mutual desire of the parties that complaints of any employee who has completed their probationary period, or of the Company shall be adjusted as quickly as possible in the following manner:
- 8:02 *Step A* Any question which an employee wishes to take up with the Company, shall be first taken up with the Foreperson or his representative, and failing a satisfactory settlement, the matter shall be deemed a grievance. The Employee may be accompanied by his Steward when taking up such matter with the Foreperson or his representative. A decision shall be rendered by the Foreperson within one (1) working day.
- 8:03 *Step B* Failing settlement under Step "A" the matter shall be put in writing and signed by the employee concerned, and taken up between the members of the Grievance Committee and the person appointed by the Company. A decision shall be rendered within two (2) working days in writing.
- 8:04 *Step C* Failing settlement under Step "B" the matter shall be taken up with the Union and the person appointed by the Company; a decision shall be rendered within two (2) working days in writing.
- 8:05 *Step D* Failing settlement under Step "C" in a grievance procedure the International Representative of the Union may be called into the procedure at the request of either Management or the Grievance Committee.
- 8:06 In addition to the aforesaid, either of the Union or the Company shall have the right to lodge a policy grievance, which shall include matters of interpretation, application, administration or alleged violation of the Agreement, or any matter affecting the employees generally or the Company generally, including any question as to whether a matter is arbitrable. Such complaint or issue shall be reduced to writing and in the event that the same is not settled by meeting as in Step "C" within four (4) working days, the complaint or grievance shall be referred to arbitration. It is understood that the above mentioned grievance procedure does not apply to probationary employees who have been disciplined or discharged by the Company. Such employees do not have the right to grieve such discipline and/or termination.

Mr. Publow indicated that because he had been involved every step of the way, in reality Step D had also been completed. Mr. Publow testified that it has been the past practice of Local 540 and the company to waive the time limits pursuant to the grievance procedure. He indicated that this was done in this case. Counsel for the company in her final submissions also acknowledged that time limits were treated very informally between the two parties. To this date the Company has not given a written reply to the grievance in accordance with Article B or C.

6. While these events were occurring, the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (the "CAW") was conducting an organizing drive of the employees at S.W. Fleming aimed at displacing Local 540. Pursuant to Board File No. 2686-89-R a pre-hearing representation vote was ordered. As a result of the vote, conducted on March 14, 1990 the CAW obtained certification for the employees of S.W. Fleming as of March 26, 1990. Therefore as of March 26, 1990 the obligation to represent the complainant (among others) passed to the CAW. As of that date the CAW is bound by the obligation to not "...act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any employee in the unit...".

7. It was the position of Phil Publow on behalf of Local 540 that as of March 14, 1990, the date the vote was conducted, it no longer was entitled to represent the employees at S.W. Fleming in the bargaining unit. The union felt it was under no obligation to carry on with the complainant's grievance when they no longer had bargaining rights. It is our decision that the relevant date for the transfer of the bargaining rights for the employees of S.W. Fleming is the date that a certificate was issued to the CAW, March 26, 1990 not the date of the vote March 14, 1990. Having said that therefore, it is our decision that as of March 26, 1990 Local 540 was no longer under any legal obli-

gation to represent the complainant nor anyone else in the bargaining unit. That obligation and legal right passed to the CAW as of that date. In coming to this conclusion we are adopting the reasoning in *Reinaldo Santos*, [1988] OLRB Rep. July 701 where the Board said

26. Section 68 imposes a duty on a union not to act in certain ways "so long as it continues to be entitled to represent employees". The plain wording suggests that once the union is no longer entitled to represent the employees, it is no longer subject to the duty. Section 56 of the Act declares one circumstance under which a union ceases to represent employees:

56.-(1) If the trade union that applies for certification under subsection 5(4), (5) or (6) is certified as bargaining agent for any of the employees in the bargaining unit defined in the collective agreement, the trade union that was or is a party to the agreement, as the case may be, forthwith ceases to represent the employees in the bargaining unit determined in the certificate and the agreement ceases to operate in so far as it affects such employees.

27. Subsection 56(1), as the Board in *Sunnybrook Foods Limited*, [1985] OLRB Rep. Feb. 337, at para. 13, said,

[m]erely (but importantly) formalizes the displacement where the certification is granted. That is, without section 56(1) there would be two bargaining agents representing the employees in the same bargaining unit. Likewise, since the successful applicant concluded a collective agreement, there would be two such collective agreements operating in respect of the employees in the same bargaining unit. Section 56(1), then, avoids this chaotic situation by terminating the bargaining rights of the incumbent trade union that is or was a party to the agreement and rendering the agreement itself inoperative.

The Board in that case was dealing with alleged violation of section 79 of the Act. It found that the certification of a new union did not leave the employees in a worse position with respect to the freeze than prior to the successful outcome because "[t]he Board is not prepared to reach such a result absent express language in the statute".

8. In reviewing the evidence of Phil Publow and the complainant regarding the actions of Local 540 prior to the successful displacement application by the CAW, it is our conclusion that Local 540 did not breach its duty to the complainant pursuant to section 68. A grievance was filed and processed. It was only when Local 540 knew that it was no longer the bargaining agent for the employees at S.W. Fleming, including the complainant, that it ceased its efforts on his behalf. Mr. Publow testified that this was the reason Local 540 did not continue to process the complainant's grievance. Local 540 did not feel that the grievance was not a good grievance. The issue therefore is whether Local 540 has a legal obligation pursuant to section 68 to continue to process the complainant's grievance when it no longer is legally able to act as bargaining agent for the complainant, as by law the CAW was then the complainant's exclusive bargaining agent. Clearly, the only answer to that question can be no. Once the exclusive right to represent employees has been lost by Local 540 and gained by the CAW, Local 540 no longer has an obligation under section 68 of the Act. Actions or conduct occurring after the date that it no longer represents employees are not subject to the section 68 duty. With respect to its actions before it ceased to represent the employees, as noted, we are satisfied that they did not breach section 68. The CAW, although it observed the proceedings, was not a party to them and we therefore do not have any evidence as to what steps if any it has taken since becoming legally obligated to represent the complainant on March 26, 1990.

9. Accordingly since we have found that Local 540 did not breach their obligation under section 68 while they were obligated to represent the complainant, and that this obligation ceased on March 26, 1990 when they were displaced by the CAW, this complaint is dismissed.

3032-89-OH Deborah Brown, Complainant v. Telford Automobile Limited, Robert Telford, Respondents

Discharge - Health and Safety - Employee discharged shortly after refusing to continue paint inventory work - Employee suffering from dizziness and headaches - Employer not providing convincing explanation for timing of discharge - Employer not discharging reverse onus - Employer is breach of Act

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *R. W. Pirrie* and *E. G. Theobald*.

APPEARANCES: *Linda Vannucci-Santini* for the applicant; *Edmund J. Stevens, Robert Telford, Peter Telford, Ken Lawrence, Janet Duff and Mark Livingston* for the respondent.

DECISION OF THE BOARD; November 13, 1990

1. This is a complaint under section 24 of the *Occupational Health and Safety Act* to the effect that Deborah Brown was fired because she refused to do unsafe work and not as the employer maintains because of overall poor performance.

2. Peter Telford hired Ms. Brown to assist at the Telford family's car and truck dealership in Tara, Ontario on May 2, 1988. She had a variety of regular duties which included answering the phone, assisting in the parts department, typing, filing and computer ordering work. In September of 1988 she was given an additional duty by Robert Telford (Peter's father), taking quarterly inventory of the paint supply. This is the task which she refused to do on March 27, 1989 citing health reasons.

3. The paint inventory is necessary because the mechanic in the Telford's employ is partly paid on a basis related to profits in the paint area. In order to calculate his pay, it is necessary to know how much paint has been sold and used. To ascertain this, it is necessary to open all cans of paint that have been used since the last inventory and estimate the amount of paint used and record it as the basis for the pay calculations. This is a job that takes somewhere between four hours and two days, depending on who does it. Ms. Brown's experience was at the upper end of this spectrum.

4. The paint is kept in a room that is approximately five feet by twelve feet, ventilated by the door and two vents. The paint room is intended as a mix room and not primarily as a place where a person would stand for hours. A Ministry of Labour health and safety inspection on November 11, 1989, which included the paint room, resulted in a report which recommended that paint mixing be done in the spray booth with respiratory protection and the provision of mechanical ventilation to the paint room. This is now being investigated by the employer.

5. Others have done the paint inventory without complaint, but Ms. Brown suffered significant symptoms in performing it. It is common ground that the fumes in the paint room could cause symptoms varying according to the individual and that polyisocyanates, which are designated substances under the OHSA, are present in some of the material stored in the paint room.

6. Ms. Brown worked on paint inventory three times, in September, 1988 and January and March 1989. She did not wear respiratory protection as she believed none was available. The mechanic had offered her a dust mask but had indicated he regularly needed the respirator he used when spraying paint. In January she complained to Peter Telford and asked him if he would get someone else to do the inventory because she could not stand the fumes. She told him about head-

aches and dizziness during and after the inventory. He said he would like her to continue even though he knew the fumes were bad. He also said he would speak to his father and let her know the decision before the next count which he did not do. She also mentioned symptoms to the parts manager and to the mechanic. On the Friday before the March inventory, Mr. Telford, Sr. reminded her about the inventory and she asked if his son had spoken to him. He said yes, and that he would have Mark, the mechanic, clean up the room so she could do it on Monday. However, Robert Telford testified that Peter had not discussed her previous problems with him when he asked her to do it in March. He was aware she had had problems with fumes, but was not aware she did not want to do the task.

7. On the day of the inventory in March Ms. Brown found the paint room full of fumes and messy although Mark Livingstone had cleaned up somewhat and had left the door open to air out the room. She started to do the inventory on the Monday, but "did not succeed the whole day". She told Ken Lawrence, the parts manager, that she was "finished" because of how she was feeling. She went to Peter Telford and said that she refused to do the inventory anymore because of the fumes. She tried to speak to Robert Telford, but he was not in, so she resolved to speak to him the next day. She felt sick to her stomach, and had headaches and dizziness, continuing into the evening. Neither she nor the Telfords were aware of the provisions of the OHSA regarding work refusal at this time. Training under the Workplace Hazardous Materials Information System (WHMIS) had not started by this time either. Since no monitoring was done it is impossible to determine if the level of exposure exceeded that permitted by the *Regulation respecting Isocyanates* made under the OHSA, Ontario Regulation 455/83 as amended by O. Reg. 23/87.

8. The following day, March 28, 1989, Ms. Brown went looking for Robert Telford, and found him alone inspecting a new lot of used cars in the parking lot and asked to speak to him. Ms. Brown testified that he said, "Speak to me now." Mr. Telford describes her manner as "determined and abrupt" - that she stormed up to him. She says she was nervous because she did not know what he was going to say and it was his decision where they had the conversation. She was fed up because she had to put up with the fumes so long. She wanted to "get it off her chest" because she had spoken to Peter and "it had gotten her nowhere." They both agree that Ms. Brown told him she did not want to do the paint inventory anymore because of the headaches and dizziness. He said, "Fine, I'll do it myself." A few minutes later he came into the parts room and said that she did not have to speak to him in the parking lot, that she could have done it in the office. She said okay, as he walked away. He was angry, she says; his voice was louder than usual and she could hear him yelling up in the sales area. Although she could not hear what he was saying, she knew he was upset. Mr. Telford denies yelling and maintains that he was upset, not because she wouldn't do the inventory, but because she was interfering with what he was trying to do in the parking lot. He compared the value of the paint inventory, in the neighbourhood of \$5,000, with that of the cars he was working with - \$228,000. He wondered why they could not have sat down later on in the morning and talked about it.

9. At the termination interview two weeks later, on April 14, 1989, Peter Telford told her he did not think she was mechanically inclined enough to do the job she had been hired to do. She asked him if it had anything to do with the paint inventory and he said "not really". She took this as an indication that it had had something to do with it. This was the first time she had heard the criticism that she was not mechanically inclined and she said she disagreed. She again asked for GM parts training. Mr. Telford said they did not have the time or the money to do that. She had previously asked the parts manager and the service manager, for training, which had not been granted, as Robert Telford thought it was not necessary. As far as she knew everyone else who had worked in the parts department had had the training. She denies saying, "Why does this always happen to me?" as Peter Telford testified she did. She was asked and agreed to stay on

until they could find a replacement. No mention was made of the reasons recorded on the separation slip which were:

Extra help was required to assist Service Manager. It was decided that above employee's skills were not compatible with this new job (based on 1 year's observation of her abilities). Our firm could not afford to hire additional person just for this job. New employee we hired is handling former employee's duties and also working as assistant to Service Manager.

Her last day of work was May 1, 1989. Her replacement now does substantially the same job as she had been doing. The general view of the Telford's, as well as the Parts Manager and the mechanic, was that although she was a nice person she did not "have what it took" to do the job. Peter Telford emphasized that discharge is not a common event in the Tara community.

10. Ms. Brown was hired on three months probation towards the end of which Mr. Lawrence, the Parts Manager, expressed concerns about her performance to both Messrs. Telfords. Mr. Lawrence testified that during the early stages of employment he had problems with Ms. Brown not catching on to where parts were and how to properly refer questions. He said she made a mistake distinguishing between rush and regular parts orders. She had ongoing problems getting information and using the parts catalogues. He eventually advised Ms. Brown to refer the calls directly through to the parts counter rather than trying to gather the information herself so as not to lose customers. He also had complaints about her filing, having instructed her to refile on several occasions. He maintains that he guided her through for quite a while but she was not catching on. He said it was basically clerical errors she was making which could lead to short payment or over payment. He did not think more training would have helped. At about six months, which would be the fall of 1989, he spoke to Peter Telford again "when [he] had had enough". Mr. Lawrence said that it was difficult to do his job when he had to constantly monitor her performance. Nothing immediately came of it as a lot of changes were being made in the business. As far as he knew, the paint inventory had nothing to do with her termination. Peter Telford made some suggestions to Ms. Brown in the Fall of 1988 in regards to computer ordering work which resulted in some improvement, although he was of the view he should not have had to show her these things. When he felt Ms. Brown could not understand instructions he did the work himself.

11. Mr. Telford Sr. testified that he knew in a general way that Mr. Lawrence didn't think Ms. Brown had what it took to do the job. He discussed the termination with his son Peter and earlier with Mr. Lawrence. He maintains that the paint inventory had nothing to do with it; it was never discussed. Peter Telford testified that the reason the termination had not been done sooner was that his father had been ill for part of the winter. When Mr. Telford Sr. returned in January, they had been preoccupied with hiring a salesman, and the subject of Ms. Brown's future with the firm was not dealt with. Robert Telford was then in Florida until mid-March and Peter Telford was away during the March school break. It was only when they were both back that Ms. Brown's future was discussed again. On direct examination Peter Telford placed this discussion in April. On cross-examination he said late March or April. Both Telfords say the paint room inventory was not raised in these discussions.

12. Ms. Brown acknowledges that she had difficulty with parts, particularly remembering location of parts, but says that this was due to the lack of systematic training given her. She had been asked a few days after she started if she wanted to get into parts and she had said yes, if they thought she could be helpful - with the right training, since she had no experience with GM parts. Other than the problem with parts, she maintains that she was not on notice of the employer's dissatisfaction with her. Ken had told her to slow down on the computer and someone else would answer the phone when she was working on the computer. No one had ever told her that she was responsible for loss of customers or money. Others made errors; it was an everyday event, she

says. She had also been praised by Peter Trelford, for example, on more than one occasion for being a "whiz" on computers.

13. Ms. Brown acknowledges filing truck work orders in car files during what she referred to as the training period. She says she had not been told the difference between truck and car serial numbers. She also admits filing current customer orders under miscellany and mixing up rush and regular orders. Although she realizes she had computer trouble that resulted in a four-hour computer shut-down, she says that others had similar problems. She says that she had trouble with phone messages if the people spoke quickly and unclearly. She thought she had not had trouble with entering options, demonstrations and vehicle transfers and was not aware others were taking over these duties. She says that the late entering of orders that she did was because the parts manager did not give them to her in time.

14. At the time of the last date of hearing, Ms. Brown had recently acquired a part-time job doing homecare for Red Cross, with the help of a good reference from Peter Trelford. Employer counsel introduced records from Ms. Brown's previous jobs from which he sought to impugn Ms. Brown's credibility and demonstrate that she generally did not perform at a high level. Ms. Brown did not interpret these records in the same light as employer counsel.

Argument

15. Employer counsel argued that Ms. Brown was simply not up to the job, which was consistent with her previous employment and scholastic record. There were discussions about terminating her in December, but nothing was done because of Mr. Trelford's health and a downturn in the business. He takes the position that the decision was made long before the paint inventory question arose in March. He suggests that her requests for training only corroborate the company's case that she was not performing adequately.

16. He maintains that the fact that nothing was said to Ms. Brown about the inventory after the refusal is an indication that it did not matter to the business. If it had been the crux, or important, would not the management have tried to convince her to do the inventory? Why would they wait two weeks? Trelford Senior's response is consistent with the low priority the job held in the constellation of tasks in that business. He was angry at the childish complainant for interrupting his work. Thus we are asked to infer that it is not probable that it was part of the reason for her firing but that, in counsel's words, "The dumb paint room had nothing to do with it." Further, it is submitted that Peter Trelford's "Not really" is not a sufficient hook on which to hang a successful complaint.

17. Complainant's counsel emphasized that this was not a case where the complainant had only complained of health problems after the fact of the discharge. The evidence is clear that she complained to the mechanic, the Parts Manager and Peter Trelford before the firing.

18. The employer says the decision to fire was made in December but there is no culminating event or major error to explain why they fired her when they did. Counsel maintains that the only trigger in evidence is the refusal to continue with the paint inventory. She received a raise in February 1989. Counsel asks if there was a problem why did she get the raise?

19. Counsel describes Mr. Trelford's response to Ms. Brown as evidence of his anti-safety animus. He heard and understood her complaint and trivialized it.

DECISION

20. The facts are not substantially in dispute although the parties characterize them very differently. It is necessary to decide whether Ms. Brown was fired because she exercised rights under the OHSA.

21. The relevant statutory provisions are as follows:

23.-

• • •

(3) A worker may refuse to work or do particular work where he has reason to believe that,

- (a) any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself or another worker.

(4) Upon refusing to work or do particular work, the worker shall promptly report the circumstances of his refusal to his employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of one of,

- (a) a committee member who represents workers, if any;
- (b) a health and safety representative, if any; or
- (c) a worker who because of his knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them,

who shall be made available and who shall attend without delay.

(5) Until the investigation is completed, the worker shall remain in a safe place near his work station.

(6) Where, following the investigation or any steps taken to deal with the circumstances that caused the worker to refuse to work or do particular work, the worker has reasonable grounds to believe that,

- (a) the equipment, machine, device or thing that was the cause of his refusal to work or do particular work continues to be likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works continues to be likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention continues to be likely to endanger himself or another worker,

the worker may refuse to work or do the particular work and the employer or the worker or a person on behalf of the employer or worker shall cause an inspector to be notified thereof.

(7) An inspector shall investigate the refusal to work in the presence of the employer or a person representing the employer, the worker, and if there is such, the person mentioned in clause (4)(a), (b) or (c).

(8) The inspector shall, following the investigation referred to in subsection (7), decide whether the machine, device, thing or the work place or part thereof is likely to endanger the worker or another person.

(9) The inspector shall give his decision, in writing, as soon as is practicable, to the employer, the worker, and, if there is such, the person mentioned in clause (4)(a), (b) or (c).

(10) Pending the investigation and decision of the inspector, the worker shall remain at a safe place near his work station during his normal working hours unless the employer, subject to the provisions of a collective agreement, if any,

- (a) assigns the worker reasonable alternative work during such hours; or
- (b) subject to section 24, where an assignment of reasonable alternative work is not practicable, gives other directions to the worker.

(11) Pending the investigation and decision of the inspector, no worker shall be assigned to use or operate the equipment, machine, device or thing or to work in the work place or the part thereof which is being investigated unless the worker to be so assigned has been advised of the refusal by another worker and the reason therefor.

(12) The time spent by a person mentioned in clause (4)(a), (b) or (c) in carrying out his duties under subsections (4) and (7), shall be deemed to be work time for which the person shall be paid by his employer at his regular or premium rate as may be proper.

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 89 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications, as if such section, except subsection (5), is enacted in and forms part of this Act.

...

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

...

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

22. The Board has consistently held that these provisions mean that the employer bears the onus of showing that no part of the reason for the discharge of the employee was activity protected under the OHSA. The fact that there may be legitimate reasons co-existing with reasons prohibited by the OHSA, is not a defence to a complaint under section 24. See, among others, *Commonwealth Construction Company*, [1987] OLRB Rep. July 961 at paragraph 21, where it is emphasized that an employer has the right to discipline an employee for unsatisfactory conduct, provided that the discipline is not motivated, even in part, because an employee was seeking to exercise rights under the OHSA.

23. In this case, neither the complainant nor the employer were aware of the provisions of the OHSA at the time of the paint room incident or at the time of the decision to discharge. Therefore the provisions of the OHSA above with respect to the calling of an inspector, for instance, were not followed. This was not argued as a barrier to the complaint, and has been found not to be so by the Board in the past. See *Bill's Country Meats Ltd.*, [1984] OLRB Rep. Nov. 1549, where the provision requiring the refusing employee "to report" to his or her employer was interpreted as a requirement that an employee candidly explain why she is refusing to work so that the employer can make an assessment of the situation and either rectify a dangerous condition or maintain that there is no danger. We are satisfied that Ms. Brown made it clear to her employer, in the person of both Peter and Robert Trelford, that the reason she was not continuing with the paint inventory was a concern for her health.

24. We are equally persuaded that she had reason to believe that the work was likely to endanger herself. Indeed, this was not challenged in argument by the employer. She had had significant symptoms in the past, which she had also communicated to others. On the day in question, she experienced similar symptoms once again, which continued even after she had left the paint room. The smell, which other witnesses had also noticed, was again present, and felt noxious to her. Although she did not know it at the time, the material in the room contained designated substances, and the room itself could have benefited by more ventilation, in the opinion of the health and safety inspector. She knew from conversations with the mechanic who dealt with the paint on a regular basis that he frequently "had a buzz on" when he went home from work, which is consistent with her experience. It is also consistent with the agreed fact that inhaling the fumes in the paint room could produce varying symptoms according to the individual's susceptibility. Ms. Brown's predecessor in the job had also experienced headaches in doing the job although she had not considered them serious enough to report. We are accordingly of the view, that although she did not follow the procedure as set out in the OHSA since she was unaware of it, Ms. Brown was exercising a right under the OHSA when she refused to continue to do paint inventory on March 27, 1988.

25. The more difficult question in this case is whether Ms. Brown was discharged because she exercised her right to refuse under the Act. It is difficult because the employer gave credible evidence that it was generally dissatisfied with Ms. Brown's performance and had discussed the possibility of terminating her as early as December. Although Ms. Brown was not aware of the extent of their dissatisfaction, she was aware of certain instances of problems with her work, and felt the need for further training herself. Thus we conclude that there was legitimate ground for the employer's concern about Ms. Brown's performance. In dealing with that concern, it had many

options including discharge. It chose discharge after the paint room incident. In this regard, the employer did very little to explain the troubling facts concerning the timing of the discharge. Accepting its managers' evidence, they had been seriously discontent for over eight months at the time of the termination interview. The probationary period had elapsed without any notice to Ms. Brown of this discontent other than a few suggestions as to preferred methods. Discussion in December about her future resulted in no action, not even a warning. The general subject of what employees were needed was necessarily implicated in the discussion of the hiring of a salesman in January and at this point it does not appear a decision to discharge had been made, although the evidence is somewhat conflicting on this point. Peter Trelford testified on direct examination that part of the reason for hiring the salesman was to free up his time to look at the whole situation, including "Are we going to let her go?" On cross-examination, on the other hand, he said that in late 1988 they had decided she would eventually have to be let go. A raise followed in February. There was still no action of any kind against Ms. Brown. Things were similarly uneventful, with the exception of the paint room incident, up until the discharge interview on April 14, 1989.

26. We conclude from Peter Trelford's evidence that the final discussion about Ms. Brown's termination took place after the paint room incident. His answer to his own counsel was that it took place in early April. When he said late March or April to complainant's counsel, he never suggested it was before the paint room incident of March 27, 1989. Although we accept that the Trelfords did not attach much importance to the matter of the paint room incident, this in itself cuts both ways. As employer counsel argued, it might indicate that the matter was so unimportant that it could not possibly have entered into the decision to discharge. On the other hand, as complainant's counsel argues, it could equally indicate that they had no appreciation of the importance of taking health and safety matters seriously, and acting upon them. Mr. Trelford acknowledges that he was upset over the exchange he and Ms. Brown had in the parking lot; he clearly saw it as childish that she would be so concerned about the paint room that she would approach him while he was dealing with expensive inventory. He distinguishes the manner of the approach from the content, and maintains that the content had nothing to do with the discharge. He made no comment as to whether the manner of the approach had anything to do with it. It may very well be that Mr. Trelford's view of the exchange in the parking lot, which in his mind had nothing to do with health and safety, put Ms. Brown's employment back on the table to be discussed with his son.

27. The statute clearly places the onus of proof on the employer. It is for the employer to satisfy us that the decision to discharge was in no part responsive to activity protected by the OHSA. In this case we are not persuaded that the matter of the paint room had nothing to do with the discharge. At the very least, in the absence of any convincing explanation for the timing of the discharge close on the heels of the above exchange with Robert Trelford, we are convinced that it reactivated a then dormant concern about her performance. The crux of the matter is that the concerns the Trelfords had about Ms. Brown's performance were not sufficient to cause them to act before the paint room incident, and became so thereafter. In the absence of any cogent explanation for the change, in light of the reverse onus, we are not persuaded that Ms. Brown's refusal, an exercise of her rights under the OHSA, was not the triggering event. We are unable to conclude that the timing was just a coincidence. In this regard, we are not persuaded that one can completely separate the manner in which Ms. Brown approached Mr. Trelford from its content. We infer from all of Mr. Trelford's evidence, that if he had agreed that Ms. Brown's concern was a serious matter, he would not have been upset at the interruption. The very purpose of the OHSA is to ensure that employee health and safety concerns are dealt with as serious matters. This purpose was not given effect by the employer in this case. In fact the very foundation of the argument made to the Board was that the paint inventory was such an unimportant part of Ms. Brown's job, and her refusal such a trivial incident, that it was hardly worthy of the employer's attention.

28. For all the above reasons, we find that the employer violated the OHSA in discharging Ms. Brown. She does not seek reinstatement. The Board will remain seized on the question of compensation if the parties are unable to come to an agreement on the amount.

1314-90-R International Brotherhood of Electrical Workers, Local 353, Applicant v. Westlake Electrical Contractors Limited, Respondent v. Group of Employees, Objectors

Certification - Petition - Practice and Procedure - Board reviewing law with respect to petitions - Objecting employees failing to demonstrate voluntariness of petition - Certificate issuing

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *R. W. Pirrie* and *P. V. Grasso*.

APPEARANCES: *Bernard Fishbein* and *Michael Oram* for the applicant; *Norman R. A. White* and *A. Saulnier* for the respondent; *Steve Marshall*, *Mike Fonseca* and *Wayne Elliott* for the objecting employees.

DECISION OF THE BOARD; November 16, 1990

1. This is an application for certification filed pursuant to the construction industry provision of the Act. At the hearing on October 26, 1990, we rendered the following oral ruling:

On the basis of the evidence we are not prepared to attribute weight to the petition filed.

The evidence of membership filed by the trade union is not affected by the petition. The union has filed membership evidence of more than 55 percent of the employees in the bargaining unit. That 55 percent threshold is met regardless of whether Mr. Massood was or was not an employee in the bargaining unit on the day of application.

We are satisfied on the basis of the evidence before us that more than fifty-five percent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on August 29, 1990, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for purpose of ascertaining membership.

A final certificate will therefore issue to the applicant effective on this date.

Our reasons for not attributing any weight to the petition will follow.

We now provide our reasons.

2. We note that the objecting employees appeared without legal counsel. The Board commented that there was no requirement that persons appearing before the Board have legal counsel. The Board not infrequently conducts a hearing where one or more parties are unrepresented. Board hearings are legal proceedings however and persons appearing on their own behalf do bear any risks involved with appearing on their own behalf. We indicated to the objecting employees that the Board's function is to adjudicate and that it would be inconsistent with our role as adjudicators to become an advocate for, or advisor to, any party to the proceeding because that party is

unrepresented by counsel. In *Skelhorns Bus Line Limited*, [1986] OLRB Rep. Oct. 1435 at paragraph 12, the Board observed:

12. Persons involved in proceedings before the Labour Relations Board have a right to appear before it with or without counsel. The Board recognizes the difficulties that face those persons who appear without counsel and normally affords such persons a somewhat greater latitude in the manner in which they conduct their cases. However, the law applicable to issues raised in a proceeding before the Board does not depend upon whether or not a party before it chooses to retain counsel. Choosing to neither retain counsel nor otherwise inform itself does not relieve a party of the obligation to prove its case. It has often been said that ignorance of the law will excuse no one from his obligations under it. Consequently, the considerations of onus, the relevant tests, and the law applicable to the Board's consideration of petitions are apposite equally to cases where a party appears with counsel and those where a party appears without counsel.

3. As the objecting employees were unrepresented, the Board did however explain the process to be followed to the objecting employees (and the other parties) both initially and throughout the proceeding. We indicated that the issue which was outstanding was the "voluntariness" of the petition which had been filed by the objecting employees. We advised the objecting employees that they must call evidence regarding the origination and circulation of the petition. We indicated that the onus was on the objecting employees to present evidence about the petition, how it originated and how signatures on the petition were obtained. We further indicated that witnesses would be sworn, would testify under oath and be cross-examined by counsel for the employer and counsel for the union. At various stages of the proceeding the Board reiterated this information.

4. In addition we note that, as is usual, upon receipt of the application for certification the Board advised the respondent of the application and provided the respondent with sufficient copies of Form 78 (Notice to Employees of Application for Certification, Construction Industry), and an appropriate number of the notices entitled "Notice to Employees". The respondent was advised to post Form 78 and the notice. The evidence before the Board indicates that the employees were provided with copies of this documentation. Each of these documents refers to a statement of desire or petition and states, *inter alia*, that employees objecting to the certification must produce a witness or witnesses who, from personal knowledge and observation, can describe the circumstances in which a petition was prepared. The notice to employees for example states:

A representative of the signing employees must appear and call witnesses to testify under oath about how the documents opposing the union originated (whose idea it was, who drafted it and where) and about the manner in which each of the signatures was obtained.

5. The burden of proving that, on a balance of probabilities, the petition represents the voluntary expressions of the employees who sign it lies with the objecting employees. The Board's reasoning has been set out in *Pigott Motors* 63 CLLC 16,264 where it was stated:

In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.

6. We find that the objecting employees have not met this burden of proof. In view of our conclusion in this matter, it is not necessary for us to review in detail all of the evidence tendered

during the course of this hearing. Nor is it necessary to deal with all of the submissions of the union.

7. As indicated, at the commencement of the hearing the Board explained to the objecting employees the necessity to call first hand evidence regarding the origination of the petition. This the objecting employees failed to do.

8. We heard the evidence of S. Marshall and M. Fonseca. They were able to testify, based on personal knowledge and observation about the manner in which the last three of the four signatures on the petition were obtained. They were unable to testify and did not know how the first signature on the petition was obtained. Neither could they adduce evidence based on personal knowledge about the circumstances surrounding the origination of the petition. The originator of the petition, the person who drafted the petition and who apparently "thought" of the idea first was not called to testify. For this reason alone the objecting employees have not met the burden of proof cast upon them.

9. There is ample and consistent Board authority for the proposition that failure by an objecting employee to call first hand evidence regarding the origination and preparation of the petition is fatal to a finding of voluntariness. In *Phillips Electronics Industries Limited*, [1974] OLRB Rep. Nov. 758 the Board stated that:

Failure by the objector to adduce first hand evidence of the origination and circulation will cause the Board to conclude that the petition may not be a true and voluntary expression of employee desires or, in other words, the voluntariness of the document has not been proven.

(See also *Drummond Business Forms Limited*, [1972] OLRB Rep. Aug. 782, *Formosa Spring Brewery*, [1974] OLRB Rep. Oct. 696, *Intercity News Company Ltd.*, [1981] OLRB Rep. Feb. 171, *Upper Canada Glass*, [1981] OLRB Rep. Aug. 1181, *Markham Hydro Electric Commission*, [1984] OLRB Rep. Oct. 1494, *Dynasty Inn*, [1986] OLRB Rep. March 326, *Hully Gully London Limited*, [1990] OLRB Rep. Feb. 160, *Remington Rand Limited*, [1963] OLRB Rep. March 535, *Trench Electric Limited*, [1976] OLRB Rep. March 163.

10. In addition there is a significant gap in the evidence with regards to the custody of the petition which is an equally fatal impediment to any finding on our part that the petition represents the voluntary wishes of the employees. Indeed the evidence which we do have about the petition does not persuade us that the change of heart by the employees with respect to union representation was voluntary.

11. That evidence discloses that the petition document first surfaced at an employee meeting held on company premises after working hours one Friday afternoon. There is no clear evidence about who called the meeting or why it was called. It was clear from the evidence however that such a meeting was unusual. The owners of the company were present at that meeting and from the evidence we conclude that all attendees at the meeting (including the owners of the company) were aware of the petition. The signatures of P2, P3 and P4 were not placed on the petition on that day but on Tuesday of the following week. We do not know when P1 signed the petition nor do we have any evidence about what happened to the petition between Friday afternoon and Tuesday afternoon when the last three signatories signed the petition.

12. The only evidence we have indicates that the last three signatories met together at the company premises during working hours on the following Tuesday. There, one of the signatories obtained the petition from the office area. The three went to the back of the office/warehouse area, signed the petition and apparently subsequently returned it to the front office. We have no evidence what happened to the petition after that or how it arrived at the Board.

13. In all of the circumstances of the case we cannot be satisfied that the persons whose signatures appear on the petition voluntarily signed the petition free from actual or perceived management involvement. The lack of evidence in this case does not necessarily indicate that the petition was influenced by management, it simply indicates that the objectors have not met the burden of proof cast upon them.

14. The Board therefore finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on December 12, 1977, the designated employee bargaining agency is the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario.

15. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

16. The Board further finds, pursuant to section 144(1) of the Act, that all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

17. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on August 29, 1990, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

18. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and

institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 14 above in respect of all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

19. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all electricians and electricians' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

20. In accordance with our oral decision of October 26, 1990, the certificates granted to the applicant are to be dated and are effective as of October 26, 1990.

0368-89-U; 0369-89-U; 0857-89-U Anna Wilson, Complainant v. Ontario Public Service Employees Union Local 110, Respondent v. Fanshawe College and the Ontario Council of Regents for Colleges of Applied Arts and Technology, Intervenors; Anna Wilson, Complainant v. Ontario Public Service Employees Union Local 110, Respondent v. Fanshawe College and the Ontario Council of Regents for Colleges of Applied Arts and Technology, Intervenors; Anna Wilson, Complainant v. Ontario Public Service Employees Union, Local 110 and Ontario Public Service Employees Union, Respondents v. Fanshawe College and the Ontario Council of Regents for Colleges of Applied Arts and Technology, Intervenors

Colleges Collective Bargaining Act - Duty of Fair Representation - Complainants alleging right under collective agreement and union constitution to arbitration of grievances and to representation by own chosen representative, whether or not union steward - Complainants alleging union breached duty of fair representation by settling workload grievance without grievor consent, by agreeing to consent arbitration award, and by amending collective agreement - Collective agreement not a contract between union and members enforceable through duty of fair representation - Union constitution not enforceable through duty of fair representation, but relevant to determination of whether union conduct arbitrary, discriminatory or in bad faith - Board finding no breach of duty

BEFORE: Judith McCormack, Vice-Chair, and Board Members R. M. Sloan and B. L. Armstrong.

APPEARANCES: Julius Melnitzer, Joseph Hoffer and Anna Wilson for the complainant; Stephen T.

Goudge, R. Ross Wells, Paddy Musson, Gary Fordyce and Tom Geldard for the respondents; *Brenda Bowlby and Guy Giorno* for the interveners.

DECISION OF THE BOARD; November 9, 1990

1. These cases are three complaints which were scheduled to be heard together, all alleging that the union respondents have violated section 76 of the *Colleges Collective Bargaining Act*. Although there is only one complainant, Anna Wilson, she is joined by a number of grievors listed in the complaints, whom we will also refer to as "the complainants" for the purpose of this decision. In Board File 0368-89-U those complainants are Sheila Hunt, Betty Sweatman, Mary Ann Tobin, Michael Grunwell and Sharon Warmuth. All of these persons are also named on Board Files 0369-89-U and 0857-89-U, together with Jeremy Gurofsky and Robert Wilson. The complainants are all professors employed by Fanshawe College, a community college in the London area. The respondents are the Ontario Public Service Employees Union ("OPSEU") and Local 110 of OPSEU ("the Local"). Fanshawe College ("the College") and the Ontario Council of Regents for Colleges of Applied Arts and Technology ("the Council of Regents") have intervened in these proceedings. The latter represents twenty-two community colleges in collective bargaining with OPSEU.

2. The hearings in this matter took place on September 25th, 1989, October 31st, November 14th, January 8th, 1990, January 16th, January 17th, January 22nd, January 23rd, January 29th, January 30th, January 31st, February 13th, March 5th, March 6th, March 7th, March 12th, March 13th, March 14th, April 30th, May 2nd, June 13th, and June 14th. Over the course of these days of hearing, we heard the evidence of twelve witnesses and received over 250 exhibits. In making our findings of fact we have carefully considered all of the oral and documentary evidence, the parties' submissions and the usual indicia of credibility, including the demeanour of witnesses, the firmness of their memories, the internal consistency and probability of their accounts, and their ability to resist the influence of self-interest on their testimony. Many of the basic facts in this matter were not in dispute, although there were considerable differences in how the parties interpreted and coloured those facts. We find it neither necessary nor desirable to recite every detail of the evidence before us, and as a result, the following represents our findings on the more salient facts.

I The Facts

3. The essence of these complaints is that the respondents violated section 76 through a series of events which include the settlement of compensation relating to a number of workload complaints, agreement on a consent arbitration award, and the amendment of a collective agreement between the Ontario Council of Regents for Colleges of Applied Arts and Technology and OPSEU. The recent history of these matters begins in 1984 when Paddy Musson, the current President of Local 110, defeated Jeremy Gurofsky, one of the complainants, in an election for that position. Mr. Gurofsky, complainants Michael Grunwell and Robert and Anna Wilson, and to a lesser extent complainants Hunt and Warmuth, have been active in Local politics for a number of years and have between them held many different Local offices.

4. It was evident that some of the complainants had difficulty accepting Mr. Gurofsky's defeat. The day of the election, Gary Fordyce, the incoming Chief Steward, met with Mr. Grunwell, the outgoing President who had custody of the Local's grievance files, to ascertain the current state of affairs with respect to grievances. Mr. Grunwell angrily accused Mr. Fordyce of running for a position he was not competent to hold, and told him both that he was inexperienced and that he had no right to be the chief steward. He also said to Mr. Fordyce that if the latter stepped out of line just once, Mr. Grunwell would lay charges against him. Mr. Fordyce asked Mr. Grunwell for

the Local's grievance files and Mr. Grunwell eventually brought in some of them. However, Mr. Fordyce later found out that there were other files Mr. Grunwell had kept, on the grounds that he was representing the individuals involved in his capacity as a Local Steward. (There are approximately 30 Stewards in the Local who are supervised by the Chief Steward). Over the telephone, Mr. Grunwell listed a number of people to Mr. Fordyce that he would be continuing to represent if a grievance was filed by them. Mr. Fordyce was not sure from this conversation whether these people actually had current outstanding grievances or not. He asked Mr. Grunwell for any files connected with these people as well and requested that Mr. Grunwell keep him informed with respect to their grievances, which Mr. Grunwell did not do.

5. There were other indications that at least Mr. Grunwell and Mr. Gurofsky were finding it hard to relinquish powers they had previously exercised in various Local capacities. Normally, the President or Chief Steward signs or authorizes settlements of grievances. Several months after the election, nine grievances were settled prior to arbitration by minutes of settlement signed by the grievor involved, the College, and Mr. Gurofsky, apparently on behalf of Local 110. Similarly, Mr. Gurofsky also requested information from the College with respect to grievances dropped or abandoned by the Local. Because of the nature of the information requested, it was apparent that the request related to union grievances only, not individual grievances, again an area usually handled by the Chief Steward or President. And in July of 1984 Mr. Grunwell wrote to OPSEU's grievance department asking that a particular union grievance which had been dismissed by an arbitrator be sent for a legal opinion with respect to judicial review. At that point, his only role was as a Local Steward, and he did not have carriage of or responsibility for union grievances.

6. It rapidly became apparent that at least Mr. Grunwell, Mr. Gurofsky, Mr. Wilson and Mrs. Wilson were also of the view that a grievor was entitled to choose his or her representative for the grievance procedure, whether or not that representative was currently a steward, and whether or not he or she was the designated steward for the grievor's work area. In addition, in their opinion, the newly-elected Local executive had no business being involved in any way in those grievances. This philosophy surfaced in a number of different ways and created various problems for the Local.

7. Large numbers of grievances were filed either by Mr. Gurofsky or Mr. Grunwell, or by persons whom they represented about which the Local executive was told nothing. If the grievances did not settle in the grievance procedure, they sent the files directly to the OPSEU grievance department for referral to arbitration. The Local found out about these grievances only when they received a copy of a letter from the OPSEU grievance department to the College referring a grievance to arbitration. These letters simply contained the name of the grievor, and a brief notation of the subject of the grievance. The grievance form which was attached to the letter sometimes provided more information and sometimes did not.

8. The Local also received a quarterly listing from the Colleges of Applied Arts and Technology ("CAAT") Grievance Scheduling Committee, a committee elected from the academic and support employees from twenty-two community colleges who bargain together. The function of this committee is to decide on the actual scheduling of arbitrations for grievances in conjunction with a management committee. At any one time, there are over 300 grievances from the academic division awaiting arbitration. Quarterly lists of grievances are sent to locals, which are then contacted by the committee for information with respect to what priority various grievances should have. Since Local 110 did not have information about many of the grievances filed by the complainants or by employees represented by them, its officers could not provide this information to the Scheduling Committee.

9. Similar problems occurred in the steps of the grievance procedure. Mr. Grunwell, Mr. Gurofsky, and Mr. and Mrs. Wilson were of the view that no one from the Local executive, including the Chief Steward, was entitled to attend grievance meetings for their grievances or the grievances of employees they were representing. Mr. Fordyce testified that there were at least twelve grievance meetings which he had tried to attend where Mr. Grunwell objected to his presence. More than one of these grievance meetings was aborted when the College allowed Mr. Fordyce to remain and Mr. Grunwell and the grievor walked out. Mr. Fordyce was content to have Mr. Grunwell speak on behalf of grievors at these meetings; however, he was of the view that he was entitled to attend as well. The collective agreement refers to "the Union steward" being present at these meetings. The Local interpreted this to mean either the grievor's work area steward, or the Chief Steward. The Local was, however, prepared to allow the grievor to have any other representative attend and speak on his or her behalf, albeit in an unofficial capacity.

10. Mr. Grunwell's view was that if he was not recognized by the College as the grievor's only representative, he would not be on equal footing with the College in these meetings. Mr. Grunwell, Mr. Gurofsky and Mrs. Wilson maintained that the Local was attempting to insert itself as a "third party" into the grievance procedure, which in their opinion was primarily a proceeding between a grievor and the College. The complainants interpreted "the Union steward" as referring to the grievor's chosen representative, whether or not he or she was the grievor's work area steward, and whether or not he or she was a steward at all.

11. These difficulties continued even after grievances were referred to arbitration. In May of 1984 Sean O'Flynn, then President of OPSEU, wrote to all local presidents, indicating that last minute adjournments and cancellations of arbitrations had cost the union thousands of dollars in unnecessary cancellation fees. As a result, he was sending them the draft schedule for grievance arbitrations for the next quarter. Locals were to have two weeks to confirm the acceptability of the scheduled dates for hearing. A lack of response would be treated as confirmation. Once the dates had been confirmed, an adjournment that was sought by a local would be at the expense of the local.

12. Following receipt of this letter, Mr. Fordyce developed a form for obtaining confirmation that grievors, their witnesses and any stewards needed would all be available on the tentative arbitration date set out in the draft schedule. Mr. Gurofsky and some of the other complainants declined to provide the information requested, apparently reflecting their view that the Local had no right to know anything about these grievances.

13. A similar problem arose with respect to a grievance arbitration which had been scheduled for hearing shortly after the election. Ms. Musson was informed by Michael Pratt, then the co-ordinator of OPSEU's grievance department, that a preparation meeting would take place with OPSEU's lawyer the evening before the arbitration. Mr. Pratt testified that generally OPSEU encourages local executive members to become involved in grievance arbitrations. Ms. Musson attended at the meeting, only to be told by Mr. Grunwell, who was acting as the grievor's steward, that she was not entitled to be present. Mr. Pratt was called to the hotel where the meeting was to be held to resolve this dispute, but was unable to do so. Mr. Grunwell adamantly maintained that he was the grievor's representative, that he was her only representative, and that if Ms. Musson insisted on attending the meeting, he would have the grievor rent her own hotel room where the meeting would take place so that Ms. Musson would be excluded. Eventually, because the time allotted for the preparation of the grievor's case was being consumed by the dispute, Ms. Musson decided not to pursue the matter that evening and departed.

14. As time went on, these problems continued. The College proposed to the Local that

common grievances be "bundled", or organized and grouped for arbitration on the basis that they dealt with the same issues or the same set of events. The Local, who was not opposed in theory to this proposition, was not able to act upon it because of the lack of information available with respect to grievances filed by some of the complainants or on which some of the complainants acted as representatives. This was especially problematic because in certain cases, Mr. Grunwell and Mr. Gurofsky had filed multiple grievances with respect to the same event. In one case, Mr. Gurofsky filed twenty-four grievances with respect to the same memo to him from the College. As a result, the Local's inability to "bundle" grievances was a real hindrance.

15. In addition, it also appears that some of the files referred directly to the OPSEU grievance department rather than through the Local were incomplete. In 1985, Lillian Stevens, then co-ordinator of the department, requested that the Local's staff representative meet with Mr. Gurofsky to obtain the missing documentation, and recommended that grievances be processed through the Local and Regional Office so that all necessary background documentation could be obtained prior to the referral to arbitration. This some of the complainants did not do.

16. All of these difficulties were compounded by the numbers of grievances involved. One quarterly report from the CAAT Grievance Scheduling Committee dated August 6, 1986, shows employees at Fanshawe College as having filed 57 per cent of all grievances waiting to be scheduled for arbitration from both the support and academic divisions of twenty-two community colleges. Three individuals, Mr. Gurofsky, Jean Lovelock, another Fanshawe College professor who apparently shared some of the complainants' views, and Mr. Grunwell were responsible for 47 per cent of all grievances, and Mr. Gurofsky himself was responsible for 32 per cent of all grievances. These divisions cover approximately 15,000 employees.

17. This state of affairs became more and more difficult in the two years following the election of Ms. Musson. Finally, at a general membership meeting on September 11th, 1986 Mr. Fordyce proposed the following motion:

That in order for the president of Local 110 to instruct the CAAT academic grievance scheduling committee to schedule a grievance, a grievor must notify, in writing, the chief steward at step 1 of the grievance procedure and provide documentation. As well, for grievances referred to arbitration but not yet scheduled, the grievor must provide the documentation to the chief steward. This procedure will allow the union local to meet its obligation under article 11.
[Article 11 is the grievance procedure article of the collective agreement].

18. At the meeting Mr. Fordyce explained to members the problems that the Local had been experiencing. A discussion followed in which Mr. Grunwell, Mr. Gurofsky and Mrs. Wilson spoke against the motion, stating they would not supply the documentation described in the motion, and arguing that the motion was a violation of their rights. In the end the motion was carried, and was sent to members with an explanatory letter signed by Ms. Musson, once again citing the numerous problems the Local had encountered and indicating that grievances would not be prioritized for arbitration where the information to do so had not been provided to the Local. This was followed by a letter from Mr. Grunwell to members to the effect that he and two other members had been "denounced" and that the denunciation was based on a collection of distortions and half truths. He described Ms. Musson's assertion that the Local needed to know about grievances to be able to prioritize them as a "complete fraud", and suggested that Ms. Musson was using favouritism in prioritizing grievances. Mr. Grunwell then went on to refer to the Local executive as members of the "ruling junta" and accused them of using the authority invested in their offices and union funds to punish certain members and reward others. This is not untypical of the writing style adopted by Mr. Grunwell, Mr. Gurofsky, and to a lesser extent Mrs. Wilson, from time to time during these events.

19. Mrs. Wilson also wrote to Ms. Musson with a copy to James Clancy, then President of OPSEU, describing Ms. Musson's statement about prioritizing as a threat to punish members. Ms. Musson replied that she had not intended to make any threats, explained again that she needed to know when grievances were filed and what they were about, both so that she could advise the Scheduling Committee and so she could decide whether a staff representative would be required at the grievance meeting, an option under the Collective Agreement. She also reiterated that all individuals would have grievances referred to arbitration, and all would be represented.

20. The motion had little impact on the situation. Although Ms. Lovelock did start bringing in copies of grievances to the Local, Mr. Grunwell, Mr. Gurofsky and Mrs. Wilson continued to refuse to provide information to the Local executive with respect to grievances. In the fall of 1986, the Local was still in the uncomfortable position of having to obtain information about grievances from the College. The College was willing to provide this information, but took the view that it did so voluntarily, and that there was no legal obligation upon it in this regard. On one occasion, the College slipped up and did not notify the Local of several grievances. From the Local's point of view, this was not a satisfactory state of affairs.

21. At this point the Local decided to grieve the College's failure to provide its officers with information about a particular grievance. It was the view of Mr. Fordyce and Ms. Musson that there was an obligation on the College to provide them with this information under the grievance procedure in the collective agreement, and it was apparent that they were still having considerable difficulty obtaining it elsewhere. A grievance was filed, and in August of 1988, the College and the Local entered into a settlement of that grievance which was incorporated into a consent award issued by a board of arbitration chaired by Kenneth P. Swan. That award, which is the subject of one of the complaints before us, provided as follows:

CONSENT AWARD

By letter dated August 9, 1988, the parties advised us that they were able to reach an agreement on matters in dispute between them in relation to the present grievance. They have also asked us to incorporate the terms of their minutes of settlement in an award.

Accordingly, we adopt the following terms as the award of the Board of arbitration in this matter:

1. The parties agree that the following terms of settlement shall be in effect for a trial period of one year from the date of signing. At the end of the trial period the College will notify the Union if they find the settlement unsatisfactory. In that event, the Union shall reserve the right to bring the grievance back before the Board of Arbitration. At the end of the trial period the college will notify the Union if they find the settlement satisfactory. In that event the Union will withdraw this grievance and these Minutes of Settlement shall remain in effect until such time as the language of Article 11 is significantly changed in negotiation.
2. The parties agree that references in Article 11 to "the Union Steward" mean either the Steward elected in the work area of the grievor or the Chief Steward. The College shall provide a copy of the grievance and will inform, in advance, the Chief Steward of all scheduled Step 1 and Step 2 grievances.
3. The parties recognize that it is not the business of the College to determine what union member(s) other than the grievor attend grievance hearings. However, the College does reserve the right to limit the Union representatives who appear at hearings to the minimum number specified in Article 11.
4. Consent of the Local Union, the College and the grievor is required to waive a Step 2 hearing.

5. The parties adjourn the above-mentioned grievance sine die for the trial period.
6. The parties agree that these Minutes of Settlement clarify the operation of Article 11 as set out above and shall become an order of the Board of Arbitration pursuant to Article 11.04. These minutes do not address past actions of either party. These minutes are without prejudice to any position either party may take should a hearing become necessary.

DATED AT TORONTO, Ontario this 19th day of August, 1988.

22. After the Swan award issued, Mr. Fordyce continued to attend grievance step meetings in his capacity as Chief Steward. The Local also continued to take the position that grievors would be allowed to have any other person present in addition to provide them with comfort and assistance. In other words, the grievor's union steward at grievance meetings was to be the work area steward or the Chief Steward, but the grievor could also bring along Mr. Grunwell or Mr. Gurofsky or anyone else to provide assistance in an unofficial capacity.

23. The complainants objected strenuously to the Swan consent award. In addition to their earlier arguments, they took the position that the Local was precluded from attending grievance meetings as a result of the *Freedom of Information and Protection of Privacy Act*, and that the College was prevented from providing the Local with information about grievances for the same reason. During the winter of 1988/1989, complainants A. Wilson, R. Wilson, Hunt, Warmuth, Sweatman, Tobin, and Grunwell all filed grievances relating to the Swan consent award or its application to specific grievance meetings.

24. In the meantime, the next round of negotiations between the community colleges and OPSEU was due to begin. Bargaining in this sector takes place between twenty-two colleges and OPSEU locals together, and results in one province-wide collective agreement for academic staff. In preparation for negotiations, each local of OPSEU holds demand-setting meetings in which any member has the right to bring forward proposals for changes in the collective agreement. Those that are passed by a majority vote are forwarded to the outgoing provincial negotiating team, which puts together a booklet of all the local proposals collected in this manner. A provincial demand-setting meeting is then attended by delegates elected from locals, together with local Presidents. A new provincial bargaining team is elected by delegates and the various proposals are discussed and prioritized by voting. Since there are usually more demands than time for discussion, those remaining are routinely the subject of an enabling motion, giving the newly-elected bargaining team the responsibility for dealing with them. The bargaining team then prepares the final proposals in accordance with the motions, directions and priorities established at the provincial demand-setting meeting. Those local proposals that were not discussed at the provincial meeting are also debated by the bargaining team until consensus is reached on them.

25. Local 110's demand-setting meeting was held on October 26, 1988. At that meeting, a number of proposals were discussed, mostly centering on wage and benefit issues of various kinds. Among them was one made by Mr. Fordyce and Tom Geldard, 1st Vice-President of the Local, who proposed changes to Article 11 to clarify the Local's right to designate union representatives for grievance procedure meetings. This motion was discussed and then carried over the objections of Mr. Grunwell, Mrs. Wilson, Mr. Wilson and Ms. Hunt.

26. All the Local 110 proposals were then forwarded to the provincial negotiating team and incorporated into the booklet of proposals to be discussed at the provincial demand-setting meeting. That meeting was held in December of 1988 and was attended by the duly-elected delegates from each Local. In addition, Mr. Grunwell, Mr. Gurofsky, Mrs. Wilson and Ms. Sweatman went to the hotel where the meeting was held, apparently to lobby delegates against the grievance procedure proposal emanating from Local 110. A new bargaining team was elected by the delegates.

and Ms. Musson, who had been the Vice-Chair of the team during the preceding round of negotiations, was selected as the Chair.

27. Not surprisingly, the contested Local 110 proposal did not get discussed during the provincial meeting. It fell under the category of "union business" which was seventh in priority after job security, salaries, workload, benefits/leaves, pensions, and sick leave. The meeting had only reached priority number four, benefits/leaves, when it came time to adjourn. As a result, all the remaining proposals were referred to the bargaining team. They were discussed by that team and adopted, in the case of Local 110's grievance procedure proposal, in a somewhat modified form.

28. OPSEU and the Colleges agreed on language in this regard in the spring of 1989, and these changes eventually found their way into a subsequent collective agreement, arrived at after a strike and a mediated/arbitrated settlement. The proposal that lead to these changes (and later the changes themselves) are the subject of one of the complaints before us.

29. At the same time as these events were unfolding, another series of incidents was taking place with respect to workload complaints filed by complainants A. Wilson, Hunt, Sweatman, Tobin and Warmuth (the "workload grievors".) The collective agreement covering Fanshawe College and Local 110 includes an extensive provision with respect to the workload of professors and a mechanism for resolving disputes in this regard. When a complaint is not resolved with a professor's immediate supervisor, it may be referred to a body called the Workload Monitoring Group, composed of equal numbers of management and union representatives. If a complaint is not resolved by this group, it can be referred to a Workload Resolution Arbitrator, who issues a written award.

30. In this case, the workload complaints were not resolved by the grievors' immediate supervisors, and were referred to the Workload Monitoring Group. Prior to the meeting of that group, Mr. Geldard, Mr. Fordyce and Lou Newell, all members of the Local executive, met with the workload grievors to prepare their presentation to the Workload Monitoring Group. Sometimes the Group invited the professors to attend its meetings to address their concerns; often the union representatives in the Group would simply present the complaints. In this case, the grievors were invited to attend. Presentations with respect to their workload complaints took place over four meetings of the Group held in the fall of 1986. The complaints were not resolved, and they were eventually referred to a Workload Resolution Arbitrator in the person of Morley Gorsky. Again, members of the Local executive met with the workload grievors to prepare their presentation for the Workload Resolution Arbitrator. Hearings were held by arbitrator Gorsky in the fall and winter of 1986/1987, during which Mr. Fordyce, Mr. Geldard, and the workload grievors presented the complaints. A series of awards were issued by the arbitrator between August and October of 1987. On certain matters, the issues of compensation and implementation were left to the parties to resolve.

31. In October of 1987, Patricia Kirkby, Dean of Health Sciences and Human Services where the workload grievors were employed, convened a meeting with the workload grievors, Mr. Geldard, Mr. Fordyce and John Sunseth, Academic Vice-President of the College, to discuss the compensation stemming from the Gorsky awards. At that meeting, a number of items were discussed in relation to these awards. By the conclusion of the meeting it was clear that the meeting participants had been able to resolve a great deal of the implementation of the awards. At the request of the grievors, the Local subsequently asked the College to pay the grievors for at least those compensation issues which had been settled, in light of the fact that they had been waiting some time for their money and the Christmas season was approaching. The College agreed, and on December 23rd, 1988 the workload grievors were paid the following amounts:

S. Hunt	\$ 21,506.39
B. Sweatman	20,612.12
M. Tobin	25,071.26
S. Warmuth	24,310.02
A. Wilson	22,100.88

32. Further meetings were scheduled in January and February of 1988 between the College, the workload grievors, Mr. Geldard and Mr. Fordyce. At this point, the only significant issues outstanding appeared to be the "fifty minute hour" issue and the "complementary functions" issue. The "fifty minute hour" issue relates to a provision in the collective agreement which reads as follows:

Article 4.01(3)

Each teaching contact hour shall be assigned as a fifty (50) minute block plus a break of up to ten (10) minutes.

33. The workload grievors argued before Mr. Gorsky that they were entitled to receive class schedules showing fifty minute teaching contact periods and ten minute breaks while teaching clinical nursing courses. As a remedy, they requested that their standard workload forms be amended to reflect the number of teaching contact hours actually worked as a consequence of the College failing to provide such schedules. In addition, they asked for overtime payments and the provision of faculty time-tables in accordance with the collective agreement.

34. At the workload arbitration hearings, the parties agreed that the faculty time-tables would be the subject of settlement discussions. Arbitrator Gorsky noted this and left the adjustment of the standard workload forms until those discussions were completed, as they might well resolve that matter as well. He did, however, say as follows:

I would merely state that if there is any dispute between the parties concerning whether the special circumstances affecting nursing teachers alters the meaning of article 4.01(3) requiring that: "each teaching contact hour shall be assigned as a fifty (50) minute block plus a break of up to ten (10) minutes", I would find that it cannot.

This was largely the position the union had asserted.

35. At the October meeting convened by Dean Kirkby to discuss implementation of the Gorsky awards, the College agreed in regard to the fifty minute hour issue to adjust the standard workload forms in accordance with the award. This meant, for example, that for grievors Wilson, Tobin, Hunt, and Warmuth, certain standard workload forms which reflected six teaching contact hours in each of two days would actually show six and a half teaching contact hours, including a one-half hour unpaid lunch break. However, the Local and the College also interpreted Article 4.01(3) to mean that there could be no partial teaching hours. As a result, the College was prepared to round up the additional one-half hour to a whole hour, so that the standard workload forms would now show a total of fourteen hours over a two day period, rather than twelve hours.

36. This change then had other consequences, since each teaching contact hour attracts other attributed work hours such as preparation, evaluation and feedback time under the collective agreement. All of this the College was prepared to grant the workload grievors at the October implementation meeting. In addition, however, the workload grievors argued that they had not been able to take their breaks during the days in question. It appears that although they were actually able to take some time off, they did not feel that this time was a break within the meaning of section 4.01(3) because they were still responsible for the clinical performance of their students

during these times. The workload grievors were of the view that formal breaks should have been scheduled or assigned by the College. The College's view was that it had directed the professors to take their own breaks, that there were fifty-five other nursing professors who had no difficulty taking their breaks, and that the College should not have had to specifically assign breaks.

37. When this issue was raised at the October meeting, Dean Kirkby agreed to provide the professors with a further payment for their breaks. This she calculated by taking, for example, the now amended fourteen hours of teaching over two days and multiplying fourteen times ten minutes for a total of one hundred and forty minutes of break time. She then subtracted two one-half hour periods for lunch periods on each of the two days which the workload grievors acknowledged they had received, leaving eighty minutes or 1.3 hours of break time for which she was prepared to pay them.

38. After the October meeting, Mr. Geldard and Mr. Fordyce discussed the 1.3 hour payment with the workload complainants who had attended the meeting. In at least the view of Mr. Geldard and Mr. Fordyce, Dean Kirkby had given the grievors a windfall because the payment for break time had not been requested before Mr. Gorsky, nor had it been awarded. In addition, they thought that Mr. Gorsky would not have awarded it to them, even if he had been asked to do so. Since the grievors had actually only worked for six hours, in the view of Mr. Geldard and Mr. Fordyce paying them for seven hours effectively paid them for six ten minute breaks as well. They assumed that Dean Kirkby had volunteered the payment because she was a new Dean, and wanted to settle the matter and put it behind her. This was confirmed by Dean Kirkby in her testimony, in which she told the Board that although she thought the grievors had actually taken their breaks, she had no proof of this a year later and she simply wanted to resolve the matter by means of a compromise.

39. The grievors on the other hand were of the view that the 1.3 hours Dean Kirkby was prepared to pay them represented time they had worked instead of time which should have been taken for breaks, and as a result the 1.3 hours should be considered teaching contact hours. Thus it should also be rounded up to two hours, (there being no partial teaching contact hours) and itself attract further attributed hours such as preparation, evaluation and feedback time. They testified that Dean Kirkby told them at the October meeting that the 1.3 hours were teaching contact hours, and in addition had partially recognized the attributed hours in the College's compensation calculations. This, then, was the fifty minute hour issue which remained outstanding at the beginning of 1988.

40. The complementary functions issue related to the first week in September in which Mrs. Wilson was assigned four hours of audio-visual review, which she argued fell into the category of curriculum development. She was of the view that these hours were either complementary functions, a category of work under the collective agreement, or preparation attributed hours. This meant that the first week of September must be considered a teaching week. The result was that the total number of teaching weeks during the year would be in excess of that permitted, and that overtime would be payable.

41. The College took the position that the audio-visual review did not represent teaching contact hours because there was no teaching contact with students, and it was not assigned in lieu of teaching as no classes were held that week. As a result, the first week in September was not a teaching contact week and Ms. Wilson had not taught a sufficient number of weeks to trigger overtime. The Local was of the view again that this issue had not been either put to or decided by Mr. Gorsky. In addition Mr. Geldard and Mr. Fordyce testified that Mrs. Wilson told them she had not actually performed the four hours of review, a statement Mrs. Wilson denied.

42. An implementation meeting which had been scheduled for February 8th was cancelled and instead, Dean Kirkby sent a memo to the workload grievors and Mr. Geldard and Mr. Fordyce, indicating that the College was maintaining its position on the fifty minute hour issue and the complementary functions issue, and clearing up several remaining details.

43. The workload grievors then wrote directly to Barry Moore, President of the College, who confirmed that Dean Kirkby's memo represented the College's position on the two outstanding issues. It was apparent at that point that the workload grievors' view of the carriage of the workload complaints mirrored their views on grievances generally. That is, they considered that they had the right to deal with them as they wished, and that the Local had no say in the matter. In addition, they had briefly discussed referring the matter back to arbitrator Gorsky with Mr. Geldard, and the differences between the Local and the grievors on the appropriate quantum of compensation had not yet hardened to the point they did subsequently.

44. Consistent with their views on carriage, the workload grievors wrote directly to Mr. Gorsky in March of 1988, asking him to resolve the two outstanding issues arising out of the implementation meetings, and setting out their position on those issues in great detail. They sent copies of this letter to the secretary of the Workload Monitoring Group and to the College, but not to the Local. Mr. Gorsky, apparently unaware that there was any difference in opinion between the grievors and the Local, responded by suggesting various options for hearing and resolving the dispute, and asking for some indication from the parties as to their preference in this regard.

45. At this point, the differing views of the workload grievors and the Local on the two outstanding issues had crystallized. The Local felt that the 1.3 hours payment for breaks on the fifty minute hour issue was itself a windfall, and that the workload grievors claim to round it up and add attributed hours to it was inconsistent with the fact that the payment was for breaks, not teaching contact hours. In their view, the workload grievors' position was tantamount to pyramiding. On the complementary functions issue, Mr. Fordyce and Mr. Geldard had concerns about whether the work had been actually done and the Local was of the opinion that neither issue had been raised in front of the Workload Monitoring Group or the Workload Resolution Arbitrator, that they had not been dealt with in the Gorsky awards, and that if the arbitrator had been presented with the two issues, he would not have awarded the remedies for which the workload grievors were now asking. In their view, the amounts actually paid to the workload grievors up to that point represented more than full implementation of the awards.

46. The grievors on the other hand continued to maintain their position that the 1.3 hours should be rounded up and attract attributed hours because it represented teaching contact hours. In their opinion, their position on the two issues flowed logically from the implementation of the awards, the terms of the hearings were not so rigid as to preclude the raising of the matters at this point, and that in any event, they had been raised previously, if somewhat indirectly. What the grievors wanted, Mrs. Wilson made clear in her testimony, was not that the matter of compensation as a whole under the fifty minute hour or the complementary issues be referred back to Mr. Gorsky but only the specific points outstanding, for example, the 1.3 hour payment. She denied in cross-examination that this was because the grievors were concerned that the arbitrator might not award even the amounts the College had already paid to them.

47. Nonetheless, Mr. Geldard and Mr. Fordyce continued to present the workload grievors' views to the College during the spring of 1988. However, when the Local became aware that the workload grievors were attempting to refer the issues back to Gorsky on their own initiative, it is apparent that their differences of opinion on implementation came into sharper focus. In addition,

it is fair to say the continuing tension between the grievors and the Local with respect to control of grievances spilled over into this context.

48. On May 17th, Ms. Musson wrote to the workload grievors to the effect that if they made independent arrangements with the Workload Resolution Arbitrator, they did so at their own expense. If they had problems regarding the implementation of the awards, she asked them to contact the union Local. Shortly thereafter, Mr. Grunwell wrote to Ms. Musson, asserting that the workload grievors had a unilateral right to take the issues back before Mr. Gorsky, that they had already contacted the union Local in the person of himself, and that the Local had no right to interfere or to refuse to pay. He insisted upon a retraction of Ms. Musson's statement and threatened legal proceedings. Subsequently, it appears that the workload grievors realized that it was up to the Local and the College to refer matters back to the Workload Resolution Arbitrator, at least in the technical sense, and they wrote to both calling upon them to do so.

49. In the summer of 1988, Ms. Musson and Mr. Geldard met with Howard Rundle, then the Academic Vice-President of the College, to make one final attempt to resolve the matter. They agreed upon a proposal for implementation which they decided to refer to the Workload Monitoring Group. The Workload Monitoring Group had on a number of occasions in the past dealt with implementation problems arising from workload awards. When the College suggested this to the grievors, they wrote to the College, with a copy to Ms. Musson, rejecting this approach on the basis that it was unethical to take the matter back from Gorsky and that it was "sheer impertinence" to suggest that this was a proper process for addressing the problem. Earlier they had written to Ms. Musson reiterating their call to reconvene the hearings before Mr. Gorsky, and issuing an ultimatum to the effect that if they did not receive a response from her within one week, including a copy of a letter to Mr. Gorsky requesting him to resume the hearings, they would consider that she had breached her duty to represent them and might take action in this regard.

50. In the fall of 1988, Ms. Musson wrote to the workload grievors indicating that she had sent the matter to the Workload Monitoring Group in an effort to get the matter resolved and to avoid unnecessary expense and inconvenience. She also said in her memo that if they were not satisfied with the result or the procedure, she would put the matter before Mr. Gorsky. At that time, she was aware that the workload grievors objected to any procedure other than referring the matter back to the Workload Resolution Arbitrator.

51. The Workload Monitoring Group met on September 28th and September 30th of 1988. Among other things, the Group reviewed the proposal with respect to implementation of the Gorsky awards, and agreed upon a resolution of the matter. Predictably, the resolution reflected the views of the College and the Local at that point. The text of the resolution is as follows:

Whereas the WMG has considered the Gorsky awards as outlined in his correspondence of 1987 08 11, 1987 08 13, 1987 08 17, 1987 08 26, 1987 10 27 and 1987 10 28 and the evidence (oral and written) of A. Wilson, S. Warmuth, M. Tobin, B. Sweatman and S. Hunt and reports of several joint union/management negotiating sessions:

It is moved that the following shall constitute full and final implementation of the above awards:

Total monetary payment made as follows to:

S. Hunt	\$ 21,506.39
B. Sweatman	20,612.12
M. Tobin	25,071.26
S. Warmuth	24,310.02
A. Wilson	22,100.88

The interpretation of the award in so far as it applies to the total teaching contact hours undertaken by the teachers on a clinical assignment is that a full day's clinical assignment constituted seven teaching contact hours. This is arrived at by assuming that each teacher was assigned teaching contact hours which began at the beginning of the timetable assignment, ended at the end of the timetable assignment, reduced each day by the scheduled time for lunch and breaks taken by the teachers.

The college agrees that the assignment of curriculum development work during weeks in which a teacher is not assigned any teaching contact hours and where such assignment is in lieu of teaching (ie. during the 36-38 week permissible teaching contact weeks for Group 1/2 teachers) will be recorded on a SWF under "Complementary Functions for Academic year," and limited to a maximum of 39 hours per week. The weeks of this curriculum development work assigned in lieu of teaching will be deemed teaching contact weeks.

Curriculum development activity outside of the teaching contact period for teachers will be done only where the activity is undertaken by mutual consent. This work need not be recorded on a SWF.

The last two paragraphs of the resolution did not provide Mrs. Wilson with any more compensation for the audio-visual review, but did set up guidelines for the future handling and compensation of curriculum development in specific circumstances. On October 4th, this resolution was sent to Ms. Musson, the workload grievors and the College by the Workload Monitoring Group.

52. Not surprisingly, the workload grievors were not satisfied with this resolution and insisted that the matter be sent back to Mr. Gorsky. At this point, however, the Local was beginning to reassess whether the issues should be referred back to him at all. Ms. Musson sent a letter to Mr. Gorsky advising him that the Workload Monitoring Group had reached a decision on compensation, but that the workload grievors were not satisfied with it. She then asked him for directions and enclosed a copy of the resolution passed by the Workload Monitoring Group.

53. By this time, Mr. Gorsky was aware of the dispute, as he had been the recipient of copies of various exchanges of correspondence as well as a number of letters directly from the workload grievors. He wrote back suggesting various options for adjudicating the outstanding issues. The Local found this latest communication confusing. As a result, Ms. Musson called Mr. Gorsky in late October in Winnipeg to ask him what he had meant when he had originally left it to "the parties" to deal with implementation. Mr. Gorsky informed her that by "the parties", he had meant the Local and the College, and that that phrase did not include the grievors.

54. At that point, the Local executive officers considered their position. In their view, the Local and the College had the right under the collective agreement to resolve the compensation flowing from the awards. In addition, compensation and implementation had been specifically referred by Mr. Gorsky to the parties, that is, the Local and the College. The Local and the College were in agreement on a proposal and the Workload Monitoring Group had approved it. They read the collective agreement as providing that when the Workload Monitoring Group reaches a decision, it was final and binding. In the Local's view, the Workload Monitoring Group's resolution represented more than the full implementation of the Gorsky awards. They did not think that the grievors were entitled to more, both in terms of what had been originally requested and in terms of what was awarded. Moreover, in practical terms they did not think that the workload grievors would obtain anything more if the matter was referred back to Mr. Gorsky. After discussing the matter with the OPSEU grievance department and one of OPSEU's lawyers, the Local decided not to reconvene the hearings before Mr. Gorsky. The Local and the College did send Mr. Gorsky a joint communique on December 6, 1988 which read as follows:

This letter is to advise you that the parties agree that your awards have been fully and com-

pletely implemented in the cases of Wilson, Tobin, Warmuth, Sweatman, and Hunt. The copy of the agreement reached between the parties is attached.

If you feel this to be a satisfactory implementation of your awards, please consider this matter closed. We extend to you our appreciation for your time and effort in assisting us. If you do not agree, please advise us.

As a result of an oversight, the agreement, which was in the form of the Workload Monitoring Group's resolution, was not enclosed with this particular letter to Mr. Gorsky. He had, however, received it previously with the letter in October asking for directions.

55. In the meantime, Mr. Grunwell had been pursuing the College on behalf of the workload grievors with respect to how the matter would be resolved. On December 9th, the College advised Mr. Grunwell of the joint communique, but told him that the Local had asked to take responsibility for indicating the content of this communication to its members, and the College had agreed with that request. This letter was copied to Ms. Musson.

56. The union did not initiate any communication to the workload grievors with respect to the contents of the joint communique to Mr. Gorsky. What Mr. Geldard did do was write to the complainants on December 14th, indicating that the Local was awaiting a response from Mr. Gorsky and that the Local would be in touch with them in the new year. The Local knew from the College's letter to Mr. Grunwell that Mr. Grunwell knew about the joint communique, and the officers agreed among themselves that if the workload grievors asked for it, the Local would provide it to them.

57. On December 15th, the workload grievors wrote again to Mr. Gorsky, asking him to reconvene the hearings. By February 13th, the Local executive had not heard from Mr. Gorsky. As a result of the way the joint communique was framed, they considered the matter to be closed, at least as far as Mr. Gorsky was concerned. Mr. Geldard accordingly advised the complainants of this, enclosing a copy of the joint communique which in turn attached the resolution of the Workload Monitoring Group, which the workload grievors had received earlier. On February 17th, Mrs. Wilson, Ms. Warmuth and Ms. Hunt sent a memo to Mr. Geldard, saying among other things, that he had "colluded with management to 'knee-cap' [them]".

58. On February 23rd, Mr. Gorsky wrote indicating that because the parties had settled the implementation of his awards, there was nothing further for him to do. As a result, he had not pursued the matter further and had considered it closed. However, he had since received the December 15th letter from the workload grievors. He indicated that subject to a request from the parties, he regarded his role as having been completed in this matter and did not see that he could unilaterally continue to exercise jurisdiction. Mr. Gorsky also sent a copy of his letter to Mrs. Wilson, with a covering letter advising her that given the settlement of the details of his awards, he had concluded that he was without further jurisdiction to act in these matters. This ended the matter for the moment. The Local's conduct with respect to implementation of the workload complaints is the subject of the third complaint before us.

59. Looking at the picture as a whole, by November of 1988, the Swan consent award had been issued, the Workload Monitoring Group had passed the resolution with respect to the Gorsky awards, and Local 110's proposals, including those affecting the grievance procedure were on their way to the provincial demand-setting meeting. As the objections of the complainants became more and more strenuous, Ms. Musson wrote to Mr. Clancy outlining the views of the Local with respect to some of the matters dealt with in the Swan consent award and in Local 110's bargaining proposals and appealing to him for assistance. It is also evident from the material before us that by this point, Vic Cooper, then the staff representative for the Local, had become embroiled in the situa-

tion, and Ms. Musson requested a meeting with the co-ordinator of the grievance department and a constitutional advisor to clarify the situation. This was the beginning of a great deal of correspondence, primarily between the complainants and Mr. Clancy. In December, Mr. Grunwell also wrote to Mr. Clancy, making a wide range of accusations against Ms. Musson and setting out his views with respect to some of the issues in the Swan consent award and the contentious Local 110 bargaining proposal. He referred both to what he describes as Ms. Musson's "less savoury schemes" and a letter from the workload grievors which he asserted describes in detail a conspiracy by the Local and the College to deprive them of their right to arbitration. His letter concluded by asserting that action had to be taken permanently to stop Ms. Musson from abridging members' rights.

60. As it turned out, the workload grievors did write to Mr. Clancy on December 21st, objecting to Ms. Musson and Mr. Geldard attending the hearing of another Workload Resolution Arbitrator and describing them as "interlopers". They also accused the Local of colluding with management in a joint effort to interfere with their right to have the workload award compensation issues arbitrated, and asserted that this constituted failure to represent them contrary to section 76 of the *Colleges Collective Bargaining Act*. As a result, they asked that the Local be placed in trusteeship until an official investigation was conducted and the question of the continued fitness of the current officers to hold office was resolved.

61. Several weeks later, Mr. Gurofsky wrote to Mr. Clancy indicating his view that the Local had no right to find out anything from grievors or their representatives about grievances which were taken to arbitration since the Local would receive both a copy of the grievance when it was referred to arbitration and a copy of the arbitration decision. This was all it needed to know, according to Mr. Gurofsky, and the Local had no legitimate interest in grievance settlements or grievance arbitration strategy. More specifically, he wrote, because there was an obligation on an arbitrator to give notice to another employee who may be adversely affected by a grievance, a personal grievance could have no affect on other Local members not notified in this manner. He also described his view of the Swan consent award and made a number of accusations dating back some four years with respect to Ms. Musson and the Local.

62. On January 10th, 1989 Mr. Clancy advised Ms. Musson, Mr. Grunwell, Mr. Gurofsky and the workload grievors that he intended to appoint an *ad hoc* committee to inquire into the matters raised and make recommendations. All interested persons in Local 110 would be given an opportunity to meet the committee and make whatever representations they wished. Because of the volume of work preceding OPSEU's imminent convention, Mr. Clancy indicated that it might not be possible to appoint the committee until early February, but that the committee would conduct its task with dispatch once appointed.

63. In the meantime, matters had heated up considerably, and a flurry of correspondence followed Mr. Clancy's announcement. In addition, a number of skirmishes were taking place with respect to particular grievance meetings, reflecting once again the differing views of the Local and the complainants with respect to representation in the grievance and arbitration process. Some of these conflicts took place in the context of the complainants' grievances with respect to the Swan consent award. The complainants particularly objected to Mr. Fordyce's presence at these grievances since he had been involved in the Local's decision to sign the Swan agreement. At one point Mr. Grunwell compared Ms. Musson to a Nazi in a letter to Mr. Clancy, and he and the other complainants made repeated demands for trusteeship. Mrs. Wilson advised Mr. Clancy in February that the workload grievors had been given "the kiss of death" by Local 110 in collusion with management in regard to the Gorsky award implementation.

64. By January 31st of 1989, the workload grievors had set out a number of conditions which had to be met before they would co-operate with the *ad hoc* committee. These conditions included the Local being placed in interim trusteeship pending the inquiry, and a requirement that the committee's terms of reference include a provision limiting participation to those with direct knowledge of events. This last condition resulted from the complainants' concerns about the growing show of support for the executive by Local members. As a result of the call for trusteeship and other allegations, the Local executive had passed a motion of confidence in Ms. Musson and had called a general meeting at which both sides were to present their views. The complainants declined to attend as they had decided that a members' meeting was not an appropriate forum to deal with the dispute, which in their view was essentially legal or constitutional in nature. The Local arranged to have the meeting chaired by a neutral person from outside the Local, and the accusations made by the complainants were read and responded to by the Local executive. The general membership then passed a motion of confidence in the Local executive. As a result, the complainants were concerned that their position at the inquiry not be undermined by their lack of support from Local members.

65. On March 2nd, Mr. Clancy announced that he had appointed Martin Teplitsky to conduct the inquiry described earlier. He sent a copy of the terms of reference for Mr. Teplitsky to the various correspondents, which read as follows:

1. To inquire into and recommend to the OPSEU president whether a grievor has the right to be represented at Steps 1 and 2 by the steward of his/her choice, or whether the right is circumscribed, limited or otherwise defined by law, the collective agreement/or the OPSEU constitution or maybe so circumscribed, limited or defined by the union Local, and to what degree.
2. Flowing from the conclusions reached under (1) above, to recommend what course of action, if any, the union should take with respect to a) the Swan award; b) the Gorsky awards.
3. To inquire into any other related matters that may appear to be relevant.
4. To hear representatives with respect to the above from the parties involved, and to that end, to determine the order of business in procedures to be followed at such hearing.
5. To report to the OPSEU president with recommendations as soon as possible, but in any event no later than April 15th, 1990. A hearing was scheduled for Wednesday, March 15th in London to allow for verbal representations.

66. Shortly thereafter, the complainants wrote to Mr. Clancy, setting out further conditions for their participation in the Teplitsky inquiry. Although Mr. Clancy had appointed a lawyer, which they had requested, they objected to the choice of Mr. Teplitsky, suggesting that he was biased as a result of holding pre-existing views about the limitations of union members' rights in general and about Mr. Gurofsky's grievances in particular. Although Mr. Clancy had indicated that only those with direct knowledge should participate in the proceedings, as requested by Mrs. Wilson, the complainants also now required that OPSEU waive any timeliness objections should the complainants subsequently lodge proceedings under section 76. In addition, the complainants again insisted that the Local be placed in trusteeship pending the inquiry, and that the complainants be compensated for their participation in the hearing. They asked for a guarantee that they would be given copies of the Teplitsky report, and requested that any union funding for the Local either be denied or apportioned equally to the Local and complainants.

67. There was some discussion between Mr. Clancy's executive assistant and the complain-

ants with respect to payments for time spent at the hearing. However, these discussions did not satisfy the complainants and some of the other conditions remained unmet. When Mr. Teplitsky conducted his hearing in March of 1989, the complainants declined to attend. Subsequently, he issued a report, which Mr. Clancy sent to the complainants and the Local. Generally speaking, it is fair to say that Mr. Teplitsky upheld the Local's position (or went even further) with respect to all matters except the Gorsky awards. With respect to the Gorsky awards, Mr. Teplitsky concluded that under the collective agreement the Local did not have the right to settle a grievor's workload complaint without his or her permission.

68. Mr. Clancy then wrote to the complainants and the Local, indicating that he had received Mr. Teplitsky's report, and adopting it in large measure, including the finding with respect to the workload complaints. Upon receipt of Mr. Clancy's letter, the Local wrote to him to the effect that they disagreed with Mr. Teplitsky's conclusion with respect to the Gorsky awards. However, in the circumstances Ms. Musson suggested that the Local put the settlement to Mr. Gorsky, that the grievors be allowed to make any submissions they wished, and that Mr. Gorsky would then decide if the settlement properly implemented the awards. Mr. Clancy had no objection to this proposal and asked Ms. Musson to canvas the grievors' views on it. Around this time, however, the complainants filed these complaints and the matter became the subject of correspondence between counsel. Although some of this correspondence was specifically labelled as "with prejudice" and included offers not contingent upon settlement of the complaints, we do not find it particularly useful in shedding light on the matters before us, given that litigation had already commenced. In addition, since the exchange subsequently segued into what might well be described as settlement negotiations, we find this correspondence too close to a number of policy considerations attached to such negotiations, and in light of the complainants' objections we have decided not to recite it or place any weight on it.

II The Decision

69. Section 76 of the *Colleges Collective Bargaining Act* provides as follows:

76. An employee organization shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees, whether members of the employee organization or not.

It was conceded that the standard a union must meet under section 76 is essentially the same as that under section 68 of the *Labour Relations Act* and as a result, we will draw upon the jurisprudence under section 68 in the course of these reasons.

70. In *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067, the Board set out its approach to section 68 in general terms:

36. Section 68 requires that each trade union decision be grounded on a consideration of relevant matters, free from the influence of irrelevant considerations. The requirement that a trade union not act in a manner which is in bad faith protects the legitimate expectation that an individual employee's bargaining agent will act honestly and free of any personal animosity toward him. The requirement that a trade union not act in a discriminatory manner protects against the making of distinctions between employees and groups of employees on bases which have no relevance to legitimate collective bargaining concerns. "Bad Faith" and "discriminatory", therefore, test for the presence, in the process or results of union decision-making, of factors which should not be present. "Arbitrary", on the other hand, describes the absence in decision-making of those things which should be present. A decision will be arbitrary if it is not the result of a process of reasoning applied to relevant considerations. The duty not to act arbitrarily requires a trade union to turn its mind to the matter at hand.

71. The Board has also said that it must assess the union's conduct in light of the fact that most of the individuals conducting its affairs are laypeople, and the standard of assessment "must consider the persons who are performing the collective bargaining functions, the norms of the industrial community and the measures and solutions that have gained acceptance within that community" (*Ford Motor Company Limited*, [1973] OLRB Rep. Oct. 519). The duty of fair representation does not require a union to take a grievance to arbitration simply because an employee so requests (*Catherine Syme*, [1983] OLRB Rep. May 775). However, the union must apprise itself of the facts of the situation and then evaluate the grievance in a fair and honest manner (*Savage Shoes, supra* and *Swing Stage Ltd.*, [1983] OLRB Rep. Nov. 1920). In considering the actions of a union in these circumstances, the Board does not decide whether a particular decision was right or wrong, or whether the Board agrees with it, but rather whether it is one which could reasonably be made in the circumstances (*Dufferin Aggregates*, [1982] OLRB Rep. Jan. 35). However, flagrant errors consistent with a non-caring attitude may breach the duty of fair representation if the union's conduct "is so implausible, so summary, or so reckless to be unworthy of protection" (*Walter Princesdomu*, [1975] OLRB Rep. May 444).

72. With this in mind, we turn first to the complaint with respect to the compensation flowing from the workload awards. It is not suggested that the Local engaged in any wrongdoing prior to the issuance of those awards. Indeed, it appears that Mr. Geldard, Mr. Fordyce and the workload grievors were able to work together in somewhat unusual harmony through the initial Workload Monitoring Group and Workload Arbitration proceedings, and even during the meetings with Dean Kirkby. Rather, it is the Local's conduct in settling the compensation flowing from the Gorsky awards over the objection of the workload grievors, and its failure to refer the matter back to Mr. Gorsky for resolution, together with its overall handling of events subsequent to the awards which counsel for the complainants argues constitutes a breach of the respondents' statutory obligation under section 76. That conduct is alleged to be arbitrary, discriminatory or to be motivated by bad faith on the part of the Local towards the grievors.

73. The key issue in this regard is whether the Local was entitled to settle the compensation owing on the awards in the face of the workload grievors' opposition. Counsel takes the position that the grievors had an absolute right to have the compensation dispute referred back to Mr. Gorsky by virtue of the collective agreement and OPSEU's constitution. In the alternative, he argues, if the Local had some discretion in this regard, it exercised it in a manner that was arbitrary, discriminatory or indicates the presence of bad faith.

74. In coming to its conclusion that the duty of fair representation does not require a union to take a grievance to arbitration simply because the grievor wishes it, the Board has described its reasons in the following manner in *Douglas Aircraft of Canada*, [1979] OLRB Rep. Aug. 745:

7. Section 60 requires a trade union to act fairly, *inter alia*, in the handling of employee grievances; but it does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes that this be done. A trade union is entitled to consider the merits of the grievance, the likelihood of its success, and the claims or interests of other individuals or groups within the bargaining unit who may be affected by the result of the arbitration. The trade union must give each grievance its honest consideration but so long as the arbitration process involves a significant financial commitment and has ramifications beyond the individual case, a trade union is not only entitled to settle grievances, but in many cases it should do so. And, as has been pointed out in a number of cases, in assessing the merits of a grievance a trade union official - especially an elected one - cannot be expected to exhibit the skills, ability, training and judgment of a lawyer. Union officials are entitled to make honest mistakes.

8. Most collective agreements contain a grievance procedure to which resort must be made before a matter can proceed to arbitration. The grievance procedure involves several stages of pre-arbitration discussion in which the parties seek to amicably resolve their differences. As in

the ordinary civil litigation process, it may be in the interest of both parties to seek an "out of court" settlement which is more modest than either might have obtained had it been entirely successful before the adjudicator. A settlement is a compromise solution which avoids the costs and uncertainties of litigation. The generosity of the settlement will depend upon the skills of the negotiating parties, the merits of the claim, the cost of the litigation process and the degree of "downside risk", i.e., the long-term ramifications of an adverse judgment. These considerations are equally applicable to the settlement of disputes arising out of collective agreements; but there is one important difference. Unlike most parties in civil matters, the trade union and employer are bound together in a relationship which will subsist so long as the employees continue to support the union and the employer remains in existence. The relationship, despite its adversarial aspects and legal veneer, is neither wholly adversarial, nor strictly legal. It is essentially an economic partnership in which both parties must be concerned about the profitability of the enterprise and the equitable resolution of disputes which occasionally arise. Like a successful marriage, a productive collective bargaining relationship depends upon the development of a spirit of compromise and co-operation. Regardless of the importance of any particular grievance, it will inevitably be only one of many (perhaps thousands) which the parties will be required to resolve during the currency of their relationship. It is in this context that the grievance procedure must be viewed. If either party obstinately adheres to an unreasonable position, or continually presses trivial claims, the entire settlement process could be undermined, and their long-term relationship prejudiced. It can hardly further mutual trust and respect if union and management officials spend needless hours discussing inconsequential or ill-founded grievances. Moreover, as a practical matter, a rigid insistence on one's "strict legal rights" is likely to provoke a response in kind, and yield only short term gains.

In *Nick Bachiu*, [1975] OLRB Rep. Dec. 919 the Board drew upon *Vaca v. Sipes* (1967) 386 U.S. 1971 to express its views:

12. An employee has no absolute right to have his grievance taken to arbitration. And a trade union, as an employee's exclusive bargaining agent, has the legal authority to settle or withdraw a grievance without an employee's consent. The labour relations policy supporting this legal conclusion was made express in the following excerpt taken from *Vaca v. Sipes* (1967) 386 U.S. 1971:

Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. In LMRA Section 203(d), 29 USC Section 173(d), Congress declared that "Final adjustment by a method agreed upon by the parties is...the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavour in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as a statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement. See Cox, *Rights Under a Labor Agreement*, 69 Harv. L Rev. 601 (1956).

If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievance to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully...It can well be doubted whether the parties to collective bar-

gaining agreements would long continue to provide for detailed grievance and arbitration procedures of the kind encouraged by LMRA Section 203(d), *supra*, if their power to settle the majority of grievances short of the costlier and more time-consuming steps was limited by a rule permitting the grievance unilaterally to invoke arbitration. Nor do we see substantial danger to the interest of the individual employee if his statutory agent is given the contractual power honestly and in good faith to settle grievances short of arbitration. For these reasons, we conclude that a union does not breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract, merely because it settled the grievance short of arbitration.

And in *Catherine Syme*, [1983] OLRB Rep. May 775, the Board said:

As a matter of good judgement, and in the interests of sound industrial relations, a trade union should make reasonable efforts to settle grievances early in the process. I do not think there is any justification for processing obviously groundless claims simply because an individual employee demands his "day in court". Such a position not only represents a waste of the employees' money in counsel and other fees associated with the arbitration process, but could also prejudice the ongoing and informal resolution of disputes, short of arbitration, where there might well be some contractual basis for the union's claim.

75. While these cases largely address initial referrals to arbitration and there are some distinctions which can be drawn between the different stages of the grievance and arbitration process, we find these passages speak authoritatively to a decision to settle compensation flowing from a workload complaint arbitration as well. The same concerns for sapping the vitality of the process, the development and maintenance of a viable relationship in which the adversarial interests of an employer and a union can be handled in a reasonable fashion, the importance of ensuring that the union can advocate the interests of employees in an effective manner, and the responsibility for administering union funds and making choices about priorities for limited resources are all valid and important considerations for a union at a later as well as an earlier point in the process and for workload complaints as well as grievances. As a result, we find that section 76 in itself contains no inherent duty on the part of the union to refer a compensation dispute back to a workload arbitrator on the request of a grievor.

76. It is in this context that we must consider the complainants' argument that the collective agreement and OPSEU's constitution created such a duty in the present case. Turning first to the collective agreement between OPSEU and the Council of Regents, all counsel pointed to different sections of the workload dispute procedure set out in Article 4 in support of their arguments with respect to the various rights and obligations of the Local, the College and the individual professors. It is not necessary to describe in detail those arguments. Suffice it to say that the settlement, or the referral of compensation difficulties back to the Workload Resolution Arbitrator is not specifically addressed by the language of Article 4, and to the extent that assistance on this point may be drawn from its provisions by inference, logic or analogy, the best that can be said for the complainants' position is that the results are ambiguous. For example, Article 4.02(5)(a) provides that where a matter is not resolved following a review by the Workload Monitoring Group, the professor may forward the matter to the Workload Resolution Arbitrator. Although this was clearly intended to address the initial referral, it might suggest that the individual has some continuing carriage rights. On the other hand, Article 4.02(4) provides that a decision on an individual workload assignment by a majority of the Workload Monitoring Group is binding on the College, the Local and the professor. Although again, this provision is clearly directed at a decision prior to the initial referral to an arbitrator, it might also suggest that where the Workload Monitoring Group has arrived even at an implementation decision, that decision is binding on the professor, thus nullifying any inference of individual carriage rights.

77. Similarly, the standard grievance procedure set out in Article 11 specifically provides an individual carriage right up to and including arbitration. Article 4 contains no such provision, an absence which thus seems more significant. On the other hand, Article 4.02(1) indicates that grievances arising with respect to Article 4 will be handled in accordance with Article 11, although articles 4.01 and 4.02 which set out the dispute resolution mechanism are specifically excluded from this. It is possible to point to numerous examples like this in the language of Article 4, without obtaining any clear indication of the negotiating parties' intention. This is not surprising since the collective agreement is usually considered to be a document which spells out the rights and obligations of the employer and the union, rather than those as between the union and individual employees.

78. Whether the collective agreement gives the grievors an absolute right to refer their disputes back to a workload resolution arbitrator was, of course, one of the subjects of Mr. Teplitsky's report. It is not necessary for us to decide whether we agree with his determination in this regard, nor are we in the unenviable position of Mr. Teplitsky who had to make sense of the various subsections of Article 4 and reach a conclusion as to the respective rights of the grievors and the Local. There are two reasons for this. Firstly, the collective agreement is not a contract between the union and its members enforceable in and of itself through section 76. Although its provisions may have some implications for our assessment of the union's conduct, our task here is to decide not whether there was in fact a right under the collective agreement, but whether the union's interpretation that there was not was so untenable as to be arbitrary, discriminatory, or reflective of bad faith. Secondly, the Board's jurisprudence indicates that the issue before us is not whether the union was correct, for example, in its interpretation of the collective agreement, but whether that interpretation is one which could reasonably be taken in the circumstances. (See, for example, *Smith & Stone (1982) Inc.*, [1984] OLRB Rep. Nov. 1609.)

79. Having heard from all three parties at great length on this subject (an advantage, we note in passing, that Mr. Teplitsky did not have) and having analyzed the collective agreement in considerable detail, we find that the Local's interpretation which allowed it to settle the compensation arising from the Gorsky awards over the objection of the grievors was an eminently reasonable one. Indeed, there is considerable support for their view to be found in the collective agreement. In addition to those sub-articles referred to earlier, Articles 4.02(6)(a), 4.02(6)(b), 4.02(6)(c), 4.02(6)(d), 4.02(6)(g), 4.02(6)(i) and 4.02(6)(j) all appear to point to the essentially bilateral character of the Workload Resolution Arbitration proceedings, the identity of the parties as the Union and the College, and the pre-eminence of those parties in controlling the proceedings. Looking at the provisions as a whole, the Local's reading was a logical and sensible interpretation, and one consonant with the labour relations context.

80. However, the complainants also argue that OPSEU's constitution gave the workload grievors an absolute right to take the compensation dispute back to Mr. Gorsky. Although unlike the collective agreement, this document may in fact be a contract of sorts between members (see *Astgen v. Smith* [1970] 1 O.R. 129, 7 D.L.R. (3d) 657), it is again not one directly enforceable through section 76. Rather, we must consider whether the constitution sheds some light on whether the Local's conduct was arbitrary, discriminatory or engendered by ill-will towards the workload grievors.

81. The complainants rely on Article 24.2 of the constitution which provides as follows:

24.2 The policy of the union is that no grievor will be denied representation at any time.

82. It is not clear to us that this article applies to the workload grievors at all. We have referred to them as "the workload grievors" for simplicity, to distinguish this group from the larger

group of complainants, but in fact where Article 4.01 and 4.02 refer to individuals, they describe them as "teachers", and the dispute as a "complaint", an "assignment" or the "matter", and so forth. (This was prior to the most recent settlement in which the parties agreed that the term "professor" would replace "teacher".) In contrast, Article 11 of the collective agreement uses the usual grievor/grievance terminology. However, even assuming that the workload grievors are "grievors" within the meaning of Article 24.2 of the OPSEU constitution, it is difficult to construe "representation" as conferring on the workload grievors an absolute right to refer the compensation dispute back to Mr. Gorsky.

83. The complainants take this view because they consider "representation" in Article 24.2, and union representation in general to consist of a sort of spokesperson role, unmediated by any differing interests or views. In other words, to them a union representative was essentially a mouthpiece, advocating whatever position a grievor wished, regardless of its merits or the interests of other members of the bargaining unit.

84. The Board has set out a different model in its jurisprudence which reflects a more complex view of union representation where the interests of the bargaining unit as a whole may from time to time be at odds with those of individual members. This approach was also well-expressed by the British Columbia Labour Board in *Rayonier and I.W.A.*, Local 1-217, [1975] 2 Can. LRBR 196:

While a grievance may originally be brought by one individual, it is not unusual for it to involve a conflict with other employees as well as with the employer. Occasionally, this is true even in the facts of a particular case, but more often it arises from the implications of the general interpretation of the agreement upon which the particular grievor is relying. By necessity, a collective agreement speaks obliquely to many new and unforeseen problems arising during the course of its administration. Rather than relying on the arbitrator's interpretation of the vague language of the agreement drafted a long time ago, it is normally more sensible for the parties to settle that type of current problem by face-to-face discussions in the grievance procedure, with the participation of those individuals who are familiar with the objectives of the agreement and the need of the operation and are thus best able to improvise a satisfactory solution. Again, if the employees are to have the benefit of this process and of the willing participation of the employer in it, the law must allow the parties to make the settlement binding, rather than allowing a dissenting employee to finesse it by pressing his grievance to arbitration. As Archibald Cox put it: 'Allowing an individual to carry a claim to arbitration whenever he is dissatisfied with the adjustment worked out by the company and the union treats issues that arise in the administration of a contract as if there were always a 'right' interpretation to be divined from the instrument. It discourages the kind of day-to-day co-operation between company and union which is normally the mark of sound industrial relations - a dynamic human relationship in which grievances are treated as problems to be solved and contract clauses serve as guideposts. Because management and employees are involved in continuing relationships, their disposition of grievances and the arbitrator's rulings may become a body of subordinate rules for the future conduct of the enterprise... When the interest of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation of striking a balance. The process is political. It involves a melange of power, numerical strength, mutual aid, reason, prejudice, and emotion. Limits must be placed on the authority of the group, but within the zone of fairness and rationality this method of self-government probably works better than the edicts of any outside tribunal.' Cox, *Law and the National Labour Policy*, at pp. 83-88.

85. As a result a union is entitled to make difficult choices about competing interests, evaluate a variety of members' claims, consider the best interests of the bargaining unit as a whole and ensure that the dues of members are not squandered on futile or unmeritorious litigation. Union representation involves more than being an *ad hoc* advocate although that is often a critical facet of its role. It also includes protecting the interests of bargaining unit employees in a variety of long term, short-term, individual and collective ways.

86. In this context, we find the complainants' view that Article 24.2 on its face obligated the Local executive to refer the compensation dispute back to the arbitrator against their better judgement singularly unpersuasive. Some kind of obligation is contained in this article but "representation" does not indicate much about the content of that obligation, and certainly nothing as specific as the right the complainants' claim.

87. We were given to understand by the parties that OPSEU has in the past interpreted this article to mean that grievances will be taken to arbitration at the request of the grievor, regardless of the merit of the grievance. However, there was no evidence before us that this interpretation of Article 24.2 had been applied to workload complaints or even to the implementation phase of grievances. There are valid distinctions which may be drawn between such complaints and the usual sort of grievance. The workload provisions in the collective agreement are complex and technical and the parties have seen fit to develop an entirely new procedure to handle complaints under those provisions. This procedure does not parallel the arbitration procedure in a number of ways. For example, the Workload Monitoring Group is a standing body set up along the lines of a joint union management committee, in contrast to the *ad hoc* step meetings contemplated by the grievance procedure. Most tellingly, as we noted earlier, there is no provision in Article 4 like Article 11.05(h) which clearly provides individual carriage rights. Of course, there are some similarities between the two procedures as well. However, looking at the situation as a whole, we find that there are sufficient differences in both the form and purpose of the workload provisions and procedures that the Local's unwillingness to extend OPSEU's interpretation of Article 24.2 to workload complaints, and to the compensation stage of such complaints at that, was not arbitrary, discriminatory or suggestive of bad faith towards the complainants. Indeed, there is nothing to prevent the union from limiting the application of their policy under Article 24.2 or even changing it, so long as that change is not improperly motivated, arbitrary or applied in a discriminatory manner.

88. As a result, the Local's decision not to refer the compensation dispute back to Mr. Gorsky was not improper in and of itself. However, it is possible to do the right thing for the wrong reasons, and we therefore must examine the grounds for the Local's decision. The evidence indicates that the executive officers were of the opinion that at least on the fifty minute hour issue, the workload grievors' position was erroneous, that the 1.3 hour payment was compensation for breaks not taken, rather than hours worked, and that the workload grievors were overreaching. In addition, they felt that the grievors had not raised the issue before the Workload Resolution Arbitrator, that they were attempting to expand upon the litigation after the fact, and that they were not likely to be successful in any event before Mr. Gorsky.

89. It cannot be said on the evidence before us that the Local acted without regard to the complainants' views, or in so reckless and cavalier a fashion as to contravene section 76. On the contrary, by the time the Local reached agreement with the College in the summer of 1988, its officers were fully apprised of the complainants' views and had given the matter a great deal of careful consideration. They ascertained the facts, solicited advice, discussed the matter at considerable length and reached an informed conclusion based on the merits of the workload grievors' claims in a manner that was entirely consistent with their obligations under section 76.

90. While these facts alone may suffice to meet the respondents' duty under section 76, we find it useful to say as well that in our view the Local's reasons for settling the compensation had considerable merit. Notes of the proceedings before Mr. Gorsky were placed before us, in addition to the awards themselves, and both witnesses and counsel took considerable pains to ensure that we were fully acquainted with the two outstanding compensation issues and the background to them. In light of all that evidence, we share the Local's view that the workload grievors had been

fully compensated by the settlement, and that there was a degree of overreaching in their pursuit of the fifty minute hour and complementary functions issues.

91. The evidence before us also indicates that the two disputed issues were not raised in any distinguishable way before the Workload Resolution Arbitrator. We accept that when awards are implemented, compensation issues may arise which were not originally addressed in litigation, simply because there was no need to do so until the outcome of the award was known. In this case, however, the two outstanding matters seemed to be several steps removed from the awards, arising (at least in the case of the fifty minute hour issue) from the settlement discussions as much as from the award.

92. It is a little more difficult to evaluate the Local's view that the Workload Resolution Arbitrator would not have awarded the compensation requested by the grievors in any event because there is no well-developed body of workload complaint jurisprudence against which the Local's assessment can be easily measured. In addition, there seem to be two aspects to this view: firstly, that the arbitrator would not have awarded these items as part of the compensation at this point because they had not been requested earlier, and secondly, that he would not have awarded them in any event had they been specifically requested in the first round of hearings. In either case, however, the question is not whether it might have been possible to wring any more money from the awards, but whether the Local was arbitrary, discriminatory, or acting in bad faith when it declined to do so. In the circumstances set out above, we conclude that it was not. As the Board's jurisprudence indicates, a union is not required to pursue every claim to the limit regardless of its view of its merits. The excerpts set out above show that those merits may include not only the chances of success, but the union's view of the appropriateness or the "justness" of the claim. Moreover, that view is sufficiently well-founded here that it does not give rise to any inference of improper motivation.

93. The complainants also focused on the second Workload Monitoring Group meeting and the lack of notification to the grievors with respect to the College and the Local's joint communiqué to Mr. Gorsky as demonstrating bad faith. The former, they argue, was arranged in haste, the workload grievors were given no opportunity to appear and present their views, and the make-up of the group dictated the result in advance.

94. There is no doubt that the final Workload Monitoring Group meeting was something of a foregone conclusion. Given that the group was composed of management and union representatives and that the College and the Local had already reached agreement on the issue, the outcome was fairly predictable. However, there was no obligation on the part of the Local to provide the grievors with an opportunity to be heard at that point. The Workload Monitoring Group was a forum for union-management discussion and settlement, not an adjudicative tribunal. The evidence indicates that generally grievors attended only at the request of the Group, where its members felt this would be useful in discussing a particular workload complaint. In other words, there was no formal obligation to provide an opportunity for the workload grievors to be heard, and not inviting them to the meeting was not so unusual as to raise some concern on our part.

95. What the Local executive did have an obligation to do under section 76 was to ensure that it was aware of the grievors' point of view and to fairly consider it before making a decision. In this case, the grievors had voiced their opinions to Mr. Geldard and Mr. Fordyce and had set out their submissions on the two issues to Mr. Gorsky in great detail in a letter which was copied to the Workload Monitoring Group, including some members of the Local executive. As we noted earlier, we are satisfied that the Local was fully apprised of the grievors' views and considered them fairly before settling on the proposal with the College in the summer. If that settlement had been

tainted, then the Workload Monitoring Group's final decision would not have saved it because it was so closely connected to the settlement. We do not think that the Local could have sheltered behind the collective agreement provisions that hold the Workload Monitoring Group's resolution of complaints to be final and binding if the settlement had been contrary to section 76. However, since there was nothing wrong with the settlement, the Workload Monitoring Group's resolution neither added nor took away from that settlement. It simply amounted to a more formal expression of it, and in fact, there were some additional gains made by the Local with respect to curriculum review at that point.

96. On the matter of the joint communique, it might have been advisable for the Local to have sent it to the workload grievors more promptly than it did, if only to avoid fueling the complainants' view that there was a conspiracy against them. However, we do not find any obligation under section 76 to do so in these circumstances, where the grievors' approval was not necessary, and where the Local did keep them informed in a general way of events as they occurred. Of course, the complainants had received the Workload Monitoring Group resolution, and they knew of the joint communique, although they did not attempt to obtain it. It is a little difficult to avoid the conclusion that they were more concerned with tabulating what they considered to be the Local's misdeeds at this point than in actually obtaining the communique. We also have some understanding of Mr. Geldard's statement that the Local did not send them the communique because it did not want to receive "a pile of memos" from the complainants about the matter, at least until after it had received a response from Mr. Gorsky. Every stage of the drama at this point seemed to bring forth the most vitriolic correspondence from the complainants. It is clear that the Local was becoming somewhat gun-shy at this point, more guarded in their conduct and unwilling to face another onslaught of accusations about their competence and character. This helps to explain their reluctance to provide much opportunity for the grievors to participate in events at this point.

97. The complainants were also of the view that the Local was obligated to pay its share of the cost of referring the dispute back to the Workload Resolution Arbitrator by Article 4.02(6)(j) which provides as follows:

4.02(6)(j) The Colleges and the Union shall each pay one-half of the remuneration and expenses of a WRA.

As a result, the complainants assert, Ms. Musson's memo to the effect that if the workload grievors made independent arrangements with Mr. Gorsky, they did so at their own expense was a violation of this provision and thus another indication of arbitrariness or bad faith.

98. We do not share this view. In the first place, Article 4.02(6)(j) is clearly directed at the usual apportionment of the costs of the Workload Resolution Arbitrator between the Local and College. It does not address an obligation on the part of the Local to the grievors. As a result, while it is possible that the Local would be liable to the College for its share of the costs of a subsequent determination by Mr. Gorsky, a statement to the workload grievors that it would not pay for such proceedings if they were initiated without the Local's consent was not a violation of either the collective agreement, or of section 76. The former is an obligation to the College; the latter is an obligation toward the complainants and the one does not necessarily follow from the other. Secondly, Mr. Gorsky was at that time resident in Manitoba, and a referral back to him had potential cost implications. It was quite legitimate for the Local to be concerned about members initiating arbitration proceedings without the consent of the Local, the cost for which the Local might well be liable to the College.

99. Ms. Musson indicated in her memo that if there were problems implementing the

awards, the workload grievors should contact the Local. In other words, it is clear the Local was attempting to assert some control over the process. In our view the Local was entitled to monitor the use of union funds and the administration of the collective agreement. And although the complainants felt that this memo was the first salvo of the ensuing conflict, it is clear that some attempt to rein in the grievors was entirely predictable in light of the grievors' unilateral attempt to refer the compensation dispute back to arbitration, and the parties' differing views which was well-known to each other on the Local's role.

100. Counsel for the complainants also points to Ms. Musson's assurance to the workload grievors in the fall of 1988 as reflecting arbitrary conduct or bad faith on the part of the Local. That assurance was that if the grievors were not satisfied with either the result or the procedure of the subsequent referral to the Workload Monitoring Group, she would put the matter before Mr. Gorsky. It was not suggested by Ms. Musson that either her subsequent letter to Mr. Gorsky enclosing the Workload Monitoring Group resolution and asking for direction in light of the grievors' dissatisfaction, or the joint communiqué represented fulfilment of that assurance. Rather, she testified that in the fall of 1988, there was a growing realization amongst the Local executive members that they were not required to send the dispute on to Mr. Gorsky regardless of their own views of its merits. That realization culminated in Ms. Musson's discussion with Mr. Gorsky as to the identity of "the parties" to whom he had left the implementation of the awards. In other words, on further reflection and after soliciting advice from both Mr. Gorsky and their lawyers, they changed their minds.

101. The original assurance was not, of course, some kind of legally binding promise enforceable in and of itself under section 76. Neither do we find the Local's change in stance to be arbitrary, discriminatory or motivated by animosity toward the grievors. The issues that they were dealing with were complex, the answers were not obvious, and the Local's change was not so abrupt, artificial or ill-founded as to lead us to believe that it was capricious or reflected bad faith.

102. It seems apparent Ms. Musson's assurance was initially influenced by OPSEU's general approach to the carriage of grievances. However, the evidence indicates that the Local executive members had not systematically turned their minds to the problem of whether the Local was required to apply that approach with respect to compensation flowing from workload complaints until it became apparent that the Local and the grievors were so dramatically polarized on the outstanding matters. Indeed, we accept that the evolution of their thinking and discussion on this point was a gradual one, taking place over a period of several months. Looking at the evidence in its entirety, we find the Local's change of position to be free of improper considerations and based on reasonable grounds.

103. Although we have found that the union's conduct in this situation was reasonable, we do not fault Mr. Clancy's adoption of Mr. Teplitsky's report. Having appointed an independent adjudicator to conduct an inquiry on the matter, it was prudent for him then to adopt the results of that inquiry. (It should be noted that Mr. Teplitsky's mandate with respect to the workload complaints was to examine the technical issue of the workload grievors' rights; he was not asked to, nor did he make any findings about the propriety of the Local's conduct or the reasons for its decision.) Similarly, the Local's response to the Teplitsky report was quite appropriate. While the executive obviously disagreed with his finding on the workload complaints, they were prepared to accept the fact that they had lost on that issue, and proposed a method of assessing any differential between the settlement and what Mr. Gorsky might have awarded as compensation. This involved placing the settlement before him and giving the workload grievors an opportunity to make submissions. As noted earlier, the complaints were filed at this time and the complainants objected to us utilizing the correspondence which followed in which this proposal and others were discussed. Suffice it

to say that there was nothing in that correspondence which the complainants relied upon as showing a contravention of section 76.

104. Nor do we find that either the Teplitsky report or OPSEU and the Local's willingness to abide by it suggest that we should conclude that the Local's previous conduct was wrongful. As noted earlier, the terms of reference put to Mr. Teplitsky and the issues before us under section 76 are quite different, and it is not surprising that the results of our respective inquiries are not the same. In addition, the willingness of OPSEU and the Local to abide by the Teplitsky report reflects more about their respect for the independent inquiry process than it does about their views on its result.

105. The complainants also allege that the Local acted in bad faith in the sense that the pattern of their conduct as a whole in the workload complaints was motivated by the more general conflict between the Local and the complainants, or by a desire to punish them or attenuate their forces within the Local structure. Because of that background of conflict, we have scrutinized the activities of the Local more closely than we might otherwise have done, and have found no hint of punitiveness or vindictiveness on the part of the Local. Certainly the Local was exasperated by the difficulties they were having in maintaining some control of the grievance process, and to that extent their assertion of control over the workload complaints was not unrelated. However, we have found that it was entirely appropriate for them to wield some authority with respect to the workload complaints, and the manner in which they did so was responsible and careful. In these circumstances, we do not conclude that any of the steps taken by the Local were improperly motivated.

106. Mr. Grunwell indicated in his testimony that in his view, the Local and the employer were in collusion. One example he gave was the fact that the amounts paid to the grievors in December which were set out in the Workload Monitoring Group's final resolution must have been obtained from the College by the Local, as the Local had no way of otherwise knowing what those amounts were. This is not a very compelling proposition. After all, the Workload Monitoring Group included College representatives, and neither the resolution itself nor the information it contained suggested that there was less than an arm's length relationship between the Local and the College. An agreement or the exchange of information in and of itself is not evidence of collusion in these circumstances. Certainly it is both necessary and desirable that even such entrenched adversaries as a union and an employer agree from time to time; otherwise there would be few collective agreements. What is more pertinent is the content of that agreement, which in this case we have already found to be proper. Indeed, there was no indication in the evidence of anything underhanded on the part of the Local in this regard. We conclude that the respondents did not breach section 76 with respect to the complaint in Board File 0369-89-U.

107. We turn now to the Swan consent award which is the subject of Board File No. 0368-89-U. It should be noted at this point that counsel for the complainants made it clear in final argument that both the Swan award complaint and the bargaining proposals complaint were being pursued solely on the basis of bad faith, and not on the basis of arbitrariness or discrimination. However, we have found it also useful from time to time to respond to the concerns the complainants addressed in their testimony before us.

108. The impugned paragraphs of the Swan award read as follows:

2. The parties agree that references in article 11 to "the union steward" mean either the steward elected in the work area of the grievor or the chief steward. The College shall provide a copy of the grievance and will inform, in advance, the chief steward of all scheduled Step 1 and Step 2 grievances.

3. The parties recognized that it is not the business of the College to determine what union member(s) other than the grievor attend grievance hearings. However, the College does reserve the right to limit the union representatives who appear at hearings to the minimum number specified in article 11.

4. Consent of the Local union, the College and the grievor is required to waive a Step 2 hearing.

109. Ms. Musson described to the Board the factors that entered into the Local's decision to sign this agreement. The executive considered the provisions of the OPSEU constitution, the collective agreement, and material provided in OPSEU training courses with respect to the structure and organization of OPSEU and the role of local stewards. Ms. Musson also conducted a telephone survey in which she spoke to persons at eighteen of the twenty-two community college academic locals to ascertain each local's practices with respect to the role of stewards and the other matters dealt with in the Swan agreement. Finally, she discussed the matter with two of OPSEU's lawyers.

110. Ms. Musson testified that the purpose of the agreement expressed by the consent award was to resolve the problems described earlier with respect to the Local's knowledge and control of the grievance process. Paragraph 2 limits the union's steward in the grievance procedure to either the steward elected in the work area or the Chief Steward. Again, as noted earlier, this did not preclude a steward from another work area or a non-steward accompanying a grievor through the steps of the grievance procedure or speaking on his or her behalf in an unofficial capacity. In addition, the College agreed to provide copies of grievances and notices of Step 1 and Step 2 grievance meetings so that the Local would have some source of information in this regard.

111. The complainants assert that in the past, persons who were not either the work area steward or the Chief Steward had officially represented grievors, and that this paragraph interfered with that practice continuing. We were not convinced that there had been such a consistent practice in circumstances where we could infer that there was a consensus within the Local membership to this effect. It was apparent that it had simply never been an issue before because there was not the same pattern of non-cooperation on the part of those acting as stewards in the past, particularly during the period when the Local executive was composed of some of the complainants.

112. In any event, even assuming that there was such an understanding, there was nothing to stop the Local from making changes in this regard when it became apparent that matters were getting out of hand. As we noted earlier, a union is entitled to monitor grievances under the collective agreement it has negotiated, for many reasons including its financial responsibilities to members, its credibility and effectiveness in the labour relationship, the obligations of union officials such as the Chief Steward to perform the duties required by their offices under the union's constitution, and so forth. The job of the union is to generally manage the union's affairs, and grievances are a crucial component of those affairs. In our view, it is ludicrous to suggest that the Local was not entitled to information about grievances or to have some control over who attended grievance meetings as its official representative. Although, as we have noted, the issue before us is different than that before Mr. Teplitsky, we find his comments useful in expressing our views on this point:

Thus, a grievor is entitled, if he so chooses to be represented by the Union. However, the right to be represented does not include the right to choose by whom one is to be represented. If the grievor wants union representation, he must take that union representation with certain implied conditions. First, the union chooses the person who appears on the grievor's behalf. In making its choice the union may consider the grievor's preferences but the choice is the union's. This is essential because every grievance, albeit an individual one, carries with it implications for the bargaining unit as a whole. A union also has principles and ideals which cannot be departed from and which may conflict with what a particular grievor may prefer in the pursuit of his own self-interest as he perceives it. This dispute illustrates the intolerable problems which can arise if

a grievor insists on his choice of steward, and, for example, the person chosen does not accept either the union's policies or its right to be informed fully at all stages of the grievance arbitration procedure.

113. Of course, the effect of the consent award was to limit, for example, the activities of Mr. Grunwell as a sort of freelance steward. However, the award was clearly directed at the problem the complainants had created, rather than the complainants themselves. The Local had an overwhelmingly legitimate interest in being involved in grievances, and its willingness to have non-stewards or non-work area stewards represent grievors in an unofficial capacity indicated that its response to the problem was not excessive in a way that would suggest bad faith.

114. The complainants were also of the view that paragraph 2 would allow the College to interfere with steward representation by manipulating the parameters of the various work areas. On the evidence before us, there was nothing to suggest even the remotest possibility that this might occur.

115. Paragraph 3 of the consent award appears to address a collective agreement provision which allows for a minimum of five persons to be released from work to attend arbitration hearings, among other things. The complainants' concern was that it could be used to limit their right to appear as a grievor's representative at hearing. Again, there was no indication that this had been a problem, either before or after the consent award, or that it was a factor in the Local's decision.

116. Paragraph 4 was inserted, according to Ms. Musson, to avoid the grievors waiving a Step 2 meeting for the purpose of precluding the involvement of the work area or Chief Steward. Since we have found that the Local has a legitimate interest in designating the appropriate steward and in having the grievance procedure properly followed, this paragraph does not offend section 76.

117. The complainants pointed to both Article 24.2 of the constitution and Article 11.05(h) of the collective agreement as indicating that the individual grievor is "supreme" (and thus able to designate who will act as his or her union steward for each grievance), and as an indication of the diminished role of the Local in a "special" union like OPSEU. We have set out Article 24.2 previously and on its face, it suggests nothing which would differentiate OPSEU from other unions, most of whom have at least a statutory obligation to "represent" members. However, if it has been interpreted as requiring the union to take grievances to arbitration solely at the request of the grievor, that is a somewhat unusual proposition. In addition, Article 11.05(h) reads as follows:

It is understood that nothing contained in this Article shall prevent an employee from presenting personally a grievance up to and including a Hearing by the Arbitration Board without reference to any other person. However, a Union Steward may be present as an observer, commencing at Step 1, if the steward so requests.

118. There is no doubt that Article 11.05(h) appears to provide grievors with an exceptional degree of independence with respect to the carriage of grievances. (As noted earlier, there is no similar provision in the workload complaint procedure). The complainants assert that these provisions set out the context within which the Local's conduct must be assessed.

119. We should say at the outset that there is nothing in the Swan award which conflicts with either Article 11.05(h) or Article 24.2. In addition, we are not prepared to read either of these provisions as transforming the entire labour relationship so that the grievance procedure becomes a proceeding between the individual and the employer, with the union as a "third party intruder" or a "interloper", as the complainants assert. In the first place, the right of the union steward is preserved in Article 11.05(h), and the clause simply on its face stands for a much more limited propo-

sition than that for which the complainants argue. The same can be said of Article 24.2, even as OPSEU has interpreted it. The fact that the parties have granted a grievor carriage rights in certain situations does not mean that the union is now excluded from the grievance process. Secondly, Article 11.05(h) is only one clause in a lengthy and sophisticated collective agreement, and we conclude that if the parties had meant to wholly recast their relationship in these terms, they would have done so in a less oblique fashion than this. Similarly, neither the vague wording of Article 24.2 nor its interpretation persuade us that the parties intended to rearrange their labour relations in such a profound manner.

120. It is difficult to avoid the conclusion that the complainants' philosophy owes as much to the fact that they are not aligned with those who presently hold office in the Local as it does to their oft-repeated assertions of principle. When the complainants or their allies lost power in the Local structure, it is evident that they developed a theory of labour relations which virtually eliminated the role of the Local executive and inflated their own rights as stewards, grievors or representatives. However, this is not a configuration which makes much sense in the labour relations context and it is not one supported by the constitution, the collective agreement, or any of the other evidence before us upon which the complainants relied. Having regard to that evidence and the overall labour relations between the union and the College, Article 11.05(h) and their interpretation of Article 24.2 are clearly the exceptions; we are not prepared to turn them into the rules. We therefore conclude that the respondents did not breach section 76 with respect to Board File 0369-89-U.

121. We turn now to the proposed changes to the collective agreement which were incorporated into the new contract. The amendments proposed by the Local were as follows:

Article 11 motion by G. Fordyce/T. Geldard that the following be added to Article 11 after "union staff representative"..."or representative designated by the local union if requested by the employee, union local or the College".

CARRIED

Article 8, 11, 14 motion by G. Fordyce/T. Geldard that where a Local action is required change "union" to "local union" in Articles 8, 11 and 14, to be consistent with Articles 4, 9, 10 and 13.

CARRIED

Mr. Grunwell conceded that the change from "union" to "local union" was an appropriate house-keeping measure and as a result, it was the first motion which was under attack by the complainants.

122. The proposals made by the provincial negotiating committee were slightly different, and the following was eventually agreed to by the parties:

Article 11

(a) 11.03

Step 1 - Change: "the Union Steward, if the Steward so requests" to "a Union Steward designated by the Union Local, if the Union Local so requests".

Step 2 - Change: "the grievor and the Union Steward" to "the grievor and a Union Steward designated by the Union Local".

- Change: "a Union staff representative" to "a representative designated by the Union Local".

123. The complainants were of the view that the Local's proposals reflected its continuing efforts to "insert itself" into the grievance procedure, that they represented an attempt to expand the Local's powers and that the provincial negotiating committee was not authorized by the provincial demand-setting meeting to either put the proposals at all, or put them in an amended form to the College. In addition, in their view the second amendment to Step 2 represented an attempt to preclude or supplant the involvement of a staff representative in Step 2 meetings, motivated at least in part because Vic Cooper had taken the complainants' part in one particular skirmish.

124. We have already addressed the concept of the Local as a third party and its role in monitoring grievances. On the subject of whether the provincial negotiating committee was properly "authorized" by the provincial demand-setting meeting, our attention was not brought to any article in the constitution which would suggest that the procedure followed was improper, or that some additional steps should have been taken. The closing enabling motion passed at the provincial demand-setting meeting gave the provincial bargaining committee the ability to deal with the Local 110 proposal, and there was no evidence to indicate that they were precluded from changing or augmenting the proposals. In light of the process by which proposals come to the provincial bargaining team, it would not surprise us if there was a certain amount of reorganization, sorting out and rationalization necessary before OPSEU's package of proposals could be put to the Council of Regents. There was no evidence before us of anything that would suggest that the process from the Local demand-setting meeting to the final provincial settlement was anything but an open, and democratic exercise in collective bargaining. We are also hard put to conclude that the provision was aimed at Mr. Cooper or his successors, given that he had also sided with the Local executive from time to time.

125. We therefore conclude that with respect to all three complaints, the respondents did not conduct themselves in an arbitrary or discriminatory fashion towards the complainants, nor were their actions motivated by bad faith. As a result, the respondents did not violate section 76.

126. Because of the kinds of accusations made by the complainants, we feel compelled to make it clear that not only did the respondents not breach section 76 at any time, but that both the members of the Local executive and the College acted with considerable restraint and patience throughout these events. In particular, because so many of the complainants' allegations were directed at Ms. Musson, we wish to say that the evidence before us indicates that she conducted herself in a thoughtful, fair-minded and professional manner in the face of extremely trying circumstances.

127. These complaints are dismissed.

COURT PROCEEDINGS

2544-86-U; 3504-86-U (Court File No. 36/89) Elizabeth Balanyk, Applicant v. The Greater Niagara General Hospital, Ontario Nurses' Association, Patricia Stuart, Marianne Orcutt, Al Weier, Liz Woods, and The Ontario Labour Relations Board

Adjournment - Judicial Review - Practice and Procedure - Unfair Labour Practice - Board refusing to grant adjournment - Board acting fairly and reasonably - Application dismissed

Board decision unreported.

Ontario Court of Justice, Divisional Court, Reid, Rosenberg, and Hart JJ., November 22, 1990.

Endorsement: This Application is dismissed. On November 15, 1988 the Board considered the Applicant's request for an indefinite adjournment and granted an adjournment to November 23rd to be continued on November 28th if necessary. On November 15th the Board made it clear the matter would have to continue on the dates specified. The Board refused the November 15th request for an indefinite adjournment.

The Applicant did not oppose the adjournment on that basis. She did not advise the Board she could not continue on November 23rd. The Applicant attended November 23rd without counsel. She indicated she had been in touch with counsel who was free that day. She did not indicate she had in fact retained counsel.

The Board carefully considered the request for further adjournment. It considered the long history of these proceedings and the fact there were other proceedings scheduled before it as well as arbitration proceedings scheduled in another forum. The Board also noted if the matter were adjourned, proceedings before it could not continue until the following year.

The Board also noted the issue to be heard on November 23rd related only to the issue of whether a settlement had been made. This would not have involved preparation or review of all prior proceedings or extensive knowledge of the Board's practice.

On November 23rd the Applicant was given an opportunity to adduce evidence. She chose not to do so.

The Board fairly and reasonably considered the request for adjournment and considered the interest of all parties before it.

We do not have to decide if we would have reached the same result.

There is no error shown in the exercise of the Board's discretion: see *Re Flamborough & Teamsters*, 24 O.R. (2d) 400 at p. 404.

In view of the interlocutory proceedings brought in this court and the result of that proceeding there will be no costs of this hearing or the interlocutory proceeding before O'Leary, J.

1295-85-R (Court File no. 696/89) Hamilton Yellow Cab Limited and Transportation Unlimited Inc., Applicants v. Retail, Wholesale and Department Store Union, AFL-CIO-CLC and the Ontario Labour Relations Board, Respondents

Bargaining Unit - Certification - Dependent Contractor - Judicial Review - Board not exceeding jurisdiction by issuing two certificates where application was for single "mixed" bargaining unit - Board correctly interpreting power to determine bargaining units - Board finding that owner/drivers and drivers were "employees" not patently unreasonable - Application dismissed

Board decisions reported at [1989] OLRB Rep. Feb. 144, [1987] OLRB Rep. Nov. 1373; Oct. 14, 1988 decision unreported.

Ontario Court of Justice, Divisional Court, O'Driscoll, Holland and Rosenberg JJ., November 19, 1990.

Rosenberg J.: (Orally)

Nature of Application

Hamilton Yellow Cab Limited and Transportation Unlimited Inc. (hereinafter collectively "Yellow Cab") apply for judicial review to quash the decisions rendered by the Ontario Labour Relations Board (the "Board") in the matter of the certification of the Retail, Wholesale and Department Store Union AFL-CIO-CLC (the "Union") as the bargaining agent of taxi drivers driving within the matrix of Hamilton Yellow Cab, including drivers who own their own vehicles ("owner/drivers"), drivers who lease shifts from owner/drivers, and drivers who operate vehicles for wages. The decisions of the Board in this matter include:

- (i) A decision of the Board dated November 18, 1987 determining that single car/plate owner/drivers are dependent contractors employed by Yellow Cab and therefore entitled to engage in collective bargaining; that drivers who lease shifts from other owner/drivers and drivers who receive wages are employees of Yellow Cab; and that, because there was insufficient evidence to indicate that dependent contractors wished to be certified in a "mixed" employee bargaining units, one consisting of dependent contractors and another consisting of drivers.
- (ii) A decision of the Board dated October 14, 1988 ordering that a certificate be issued to the Union respecting the bargaining units noted above, on the basis of membership evidence demonstrating more than fifty-five percent of employee support in each bargaining unit.
- (iii) A decision of the Board dated February 22, 1989 dismissing the application of Yellow Cab for reconsideration of the two Board decisions referred to above.

The application by the Union had been for a single all employee bargaining unit.

The Facts

The Business of Yellow Cab

Yellow Cab is engaged in the taxi-cab brokerage business in the City of Hamilton. At the time that the application for certification was made, there were approximately 102 taxi-cabs operating under the Yellow Cab banner.

As a brokerage, Yellow Cab provides the following services a taxi-cab operators:

- (i) access to a computer dispatch service; and
- (ii) use of substations which Yellow Cab has acquired through lease agreements with various property owners.

All taxi-cabs operating under the Yellow Cab banner are linked to a plate owner. A plate owner may, in turn, be economically associated with the lessee of a car, a lessee of the plate, one or more drivers, or, a plate owner may be associated with no one.

Each plate owner, or someone with whom he is associated, is responsible for providing a car and all necessary equipment, including a roof sign, taxi-cab meter, two-way radio and mobile taxi computer. A plate owner may purchase or rent the above equipment from Yellow Cab, although there is no requirement or obligation that he do so. Most people lease the mobile computer from Yellow Cab for the flat fee of \$45 per month per car; the majority of the operators own the other equipment referred to. All the necessary equipment was purchased or leased from Yellow Cab - approximately 75 leased and 25 purchased.

Yellow Cab's revenues derive from the flat fee of \$235 per month per car for the services listed. Taxi-cab drivers do not receive wages payable by Yellow Cab. Their remuneration derives from the fares paid to them by passengers carried in the taxi-cab that they drive.

Taxi-cab drivers have financial arrangements with the owner/driver from whom they lease shifts. Yellow Cab has no direct control over the financial arrangements made between owner/drivers and the drivers who lease shifts from them, including the scheduling of vacation time and replacements due to illness.

Yellow Cab does not make any payments with respect to:

- (i) unemployment insurance,
- (ii) Canada Pension Plan,
- (iii) workers' compensation, or
- (iv) Revenue Canada personal income tax deductions.
in respect of owner/drivers or drivers.

Neither owner/drivers nor drivers are under any obligation to Yellow Cab to work particular shifts or to be available to work certain days of the week.

Union membership cards were signed by drivers on the basis of an application for an all employee

“mixed” unit. The Union made no distinction in its organizing campaign between owner/drivers and drivers.

After a number days of hearing, the Board rendered its decision in respect of this application on November 19, 1987. The Board determined, *inter alia*, that:

- (i) non-owner/drivers are “employees” of Yellow Cab because they are under the direct control of Yellow Cab dispatchers and supervisors while on duty; and
- (ii) single-car owner/drivers are dependent contractor employees of Yellow Cab due to the fact that Yellow Cab exercises similar control over their operations while they are driving taxis within the Yellow Cab matrix.

In the decision of November 18, 1987 the Board also considered the appropriate bargaining unit configuration.

The membership card signed by drivers did not distinguish between drivers and owner/drivers.

The Board noted that, despite the fact that the application was made for a “mixed” bargaining unit, there was not sufficient positive evidence indicating that owner/drivers actually “wished” to be included in the same bargaining unit as drivers, to justify the certification of a mixed unit in accordance with section 6(5) of the *Labour Relations Act* (“LRA”).

The Board considered the provisions of sections 6(1) and 7(2) of the *Labour Relations Act* (the “LRA”), which provide for the canvassing of employee wishes regarding bargaining unit configuration and certification respectively, to be demonstrative of the necessity that employee wishes be canvassed in a positive manner.

Because the Board did not consider it appropriate to exercise its discretion under section 6(5) to certify the “mixed” unit applied for, it decided on its own accord to create and certify two separate bargaining units.

Subsequent to this decision, further discussions were held between the Union and representatives of Yellow Cab and Transportation concerning the description of the bargaining units as declared by the Board in its decision.

The matter then came on for a further hearing before the Board and the Board rendered its decision in respect of the bargaining unit.

The Board indicated that it did not consider a representation vote pursuant to section 7(2) of the *Labour Relations Act* to be necessary in the circumstances, as more than 55% of the employees in each bargaining unit created by the Board were members of the Union.

The Board did not comment on the necessity of calling a vote pursuant to section 6(1) of the *Labour Relations Act* to determine employee wishes regarding the bargaining unit configuration itself.

The bargaining units were described as follows:

“BARGAINING UNIT #1:
Dependent Contractors

All dependent contractors of the respondent in the City of Hamilton who are operating as single plate owner/operators including those operators who lease a taxi-cab plate, save and except supervisors, garage, office and dispatch staff, multi-car or plate operators, and persons above the rank of supervisor.

BARGAINING UNIT #2:
Drivers

All drivers within the taxi-cab system of the respondent in the City of Hamilton who drive a taxi-cab either on a commission or leased shift-basis, or for wages, save and except supervisors, garage, office and dispatch staff, and persons above the rank of supervisor”.

The applicant Yellow Cab described the first issue as follows:

Did the Board exceed its jurisdiction, having regard to section 6(5) of the *Labour Relations Act*, by failing to dismiss the application for certification of a “mixed” unit of dependent contractors and conventional employees, given the lack of positive evidence indicating that owner/drivers wished to be included in a mixed unit?

The *Labour Relations Act* provides:

“6.(1) Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

(5) A bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of such dependent contractors wish to be included in such bargaining unit”. R.S.O. 1980, c.228, s.6.

In our view, the Board correctly interpreted subsections 6(1) and 6(5). While they could have ordered a vote to determine if the majority of the dependent contractors wished to be included in a bargaining unit with employees, they had a discretion in that regard which they properly exercised.

The second issue raised by Yellow Cab was:

Did the Board exceed its jurisdiction by issuing two certificates to the respondent Union in the face of an application for certification of a single “mixed” bargaining unit?

In our view, subsections 6(1) and 6(5) make it clear that the Board has the jurisdiction to do what it did.

The subsections do not require the Board to either accept or reject the applicants' proposed bargaining unit. Subsection 6(1) provides, "the Board shall determine the bargaining unit that is appropriate".

The third issue raised by Yellow Cab:

Was it patently unreasonable for the Board to conclude that owner/drivers are dependent contractor "employees" of Yellow Cab, and that the drivers who lease shifts from them are also "employees" of Yellow Cab, given the economic relationship between these two groups?

With regard to the owner/drivers the Board correctly analyzed the relationship between them and Yellow Cab, and reached a decision that is not patently unreasonable.

The situation is more difficult with regard to the drivers hired by the owner/drivers as "helpers" or lessees. There may be difficulties with regard to collective bargaining because many of the usual terms of employment are not negotiated with Yellow Cab. However, the Board applied the appropriate tests and referred, for example, to control by Yellow Cab as follows:

A memo dated November 1, 1985 sets out various rules governing the use of the taxistand at the Royal Connaught Hotel, including parking privileges, booking procedure, speed limits, and an injunction to use the containers provided to dispose of trash. Drivers not complying with these rules are first given a warning. A subsequent infraction results in immediate suspension until the driver contacts "management" or his "supervisor" to seek reinstatement. In the case of fill-in drivers this supervisor is *not* the owner-operator. It is an employee of Yellow.

After a number of similar analysis of the relationship including the fact that Yellow Cab has the ultimate right to blackball drivers or refuse to allow them to drive under the Yellow insignia, the Board found these drivers to be employees. Their findings in that regard are not patently unreasonable.

One other argument raised by Yellow Cab is that it is not appropriate or in accordance with the objects of the *Labour Relations Act* to have owner/drivers who actually in some respect are employers of the "helpers" represented by the same Union as the "helpers". While this may present some difficulties it is not expressly prohibited by the Act, and the expertise of the Board members to assess the possible difficulties should be given judicial deference by the court.

The application is dismissed. The applicants to pay to the respondents their costs of this application hereby set at \$3,500. Counsel for the Ontario Labour Relations does not ask for costs and none are awarded.

3343-87-G (Court File No. 709/89) Ontario Hydro and Electrical Power Systems Construction Association, (Applicants) v. Ontario Sheet Metal Workers' and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and the Ontario Labour Relations Board, (Respondents)

Construction Industry Grievance - Damages - Judicial Review - Remedies - Board decision that failure to hold mark-up was a breach of the collective agreement was not patently unreasonable - Assessment of damages not unreasonable - Application dismissed

Board decision dated December 12, 1988 reported at [1988] OLRB Rep. Dec. 1303.

Ontario Court of Justice, Divisional Court, O'Leary, Southey, O'Brien JJ., November 15, 1990.

O'Leary J.: This application is dismissed. The Board's decision that the failure to hold a mark-up meeting constituted a breach of the collective agreement was not patently unreasonable. It was for that breach that damages were awarded. They were assessed on the basis that there was an 85% probability that the work would have been correctly assigned to the Sheet Metal Workers if the mark-up meeting had been held. We see nothing unreasonable in that assessment.

The fact that no damages would have been awarded in the unlikely event that the meeting had been held and Hydro had made the wrong assignment, does not protect Hydro from liability for damages for failing to hold the mark-up meeting.

To use Mr. Field's analogy, Hydro would have had the right to be wrong, but it did not have the right to fail to hold a hearing.

The application is dismissed, the applicant's will pay to the Sheet Metal Workers their costs of the application which are hereby fixed at \$4,000.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING OCTOBER 1990

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0039-89-R: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Del-Co Electrical Ltd. (Respondent) v. Group of Employees (Interveners)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in the employ of the respondent in all sectors of the construction industry other than the industrial, commercial and institutional sector in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), and the County of Wellington, save and except non-working foremen and persons above the rank of non-working foreman" (21 employees in unit)

2953-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. Vanson Construction Ltd. (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0294-90-R: Retail, Wholesale & Department Store Union (Applicant) v. Sudbury News Service Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Cities of Sudbury, North Bay and Sault Ste. Marie, save and except supervisors, persons above the rank of supervisor, office and clerical staff and students employed during the school vacation periods" (19 employees in unit) (*Having regard to the agreement of the parties*)

0352-90-R: Canadian Union of Public Employees (Applicant) v. Chatham Public Library (Respondent)

Unit: "all employees of the respondent in Chatham regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Deputy Chief Librarian, persons above the rank of Deputy Chief Librarian, Payroll Accounts Clerk, Administrative Secretary, Information/Reference Department Heads and Circulation/Bookmobile Department Heads" (26 employees in unit) (*Having regard to the agreement of the parties*)

0555-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Med Siding (Respondent) v. Group of Employees (Objectors)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic

Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0862-90-R: Labourers' International Union of North America, Local 506 (Applicant) v. Byron-Hill Construction Corporation (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1070-90-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Holiday Inn of Oshawa of the Commonwealth Hospitality Ltd. (Respondent)

Unit: "all banquet employees of the respondent at its hotel in Oshawa, save and except banquet supervisor, persons above the rank of banquet supervisor, office, clerical and sales staff, security staff, employees in bargaining units for whom any trade union held bargaining rights as of July 16, 1990, and students employed during the school vacation period" (17 employees in unit) (*Having regard to the agreement of the parties*)

1071-90-R: Ontario Public Service Employees Union (Applicant) v. John Howard Society of Metropolitan Toronto (Respondent)

Unit #1: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, secretary to the Executive Director, accountant, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week" (21 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Application for Certification Dismissed Without Vote*)

1079-90-R: C.U.P.E. (Applicant) v. Umbrella Family & Child Centres of Hamilton (Respondent)

Unit #1: Unit: "all employees of the respondent in Hamilton, save and except centre supervisors, persons above the rank of centre supervisor, persons regularly employed for not more than 24 hours per week and students employed in co-operative education programs" (43 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*)

1100-90-R: Ontario Public Service Employees Union (Applicant) v. Community Living Huronia (Respondent) v. Group of Employees (Objectors)

Unit #1: (see *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*)

Unit #2: "all employees of the respondent in the Town of Midland, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office, and clerical staff" (63 employees in unit) (*Having regard to the agreement of the parties*)

1124-90-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Applicant) v. Roy Tavel's General Welding Inc. (Respondent)

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers' apprentices in the employ of the respondent in all sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the

industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

1207-90-R: International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers (Applicant) v. Visionwall Installations Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all journeymen and apprentice glaziers and metal mechanics in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice glaziers and metal mechanics in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1257-90-R: Service Employees' International Union, Local 204, A.F. of L., C.I.O., C.L.C. (Applicant) v. Women's Habitat of Etobicoke (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (5 employees in unit) (*Having regard to the agreement of the parties*)

1259-90-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Touchstone Masonry Ltd. (Respondent) v. International Union of Bricklayers & Allied Craftsmen, Local 5 (Intervener) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1260-90-R: International Union of Bricklayers & Allied Craftsmen, Local 5 (Applicant) v. Touchstone Masonry Ltd. (Respondent) v. Labourers' International Union of North America, Local 1059 (Intervener) v. Group of Employees (Objectors)

Unit: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1304-90-R: Association of Allied Health Professionals: Ontario (Applicant) v. The Peterborough Civic Hospital (Respondent) v. Ontario Public Service Employees Union (Intervener)

Unit: "all paramedical employees of the respondent in the City of Peterborough, save and except supervisors, persons above the rank of supervisor and persons for whom any trade union held bargaining rights as of August 15, 1990" (87 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1338-90-R: International Union of Operating Engineers, Local 793 (Applicant) v. Pierre Gagne Contracting Ltd. (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, construction labourers and truck drivers, in the employ of the respondent in the Township of Chapleau and all townships adjacent thereto in the District of Sudbury, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

1363-90-R: Ontario Public School Teachers' Federation (Applicant) v. The Sault Ste. Marie Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its elementary panel in Algoma District, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*" (125 employees in unit) (*Having regard to the agreement of the parties*)

1443-90-R: Christian Labour Association of Canada (Applicant) v. Ray of Hope Inc. (Respondent)

Unit: "all employees of the respondent at Hope Manor in the Regional Municipality of Waterloo, save and except the assistant programme director, persons above the rank of assistant programme director, social director, office, and clerical staff" (31 employees in unit) (*Having regard to the agreement of the parties*)

1447-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. M.T.S. Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1457-90-R: International Union of Operating Engineers, Local 796 (Applicant) v. Atlantic Packaging Products Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all stationary engineers and persons primarily engaged as their helpers, employed by the respondent, in its power house at its Atlantic Newsprint and Tissue Division in Whitby, save and except chief operating engineers and persons above the rank of chief operating engineer" (4 employees in unit) (*Having regard to the agreement of the parties*)

1465-90-R: Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees Local No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Corporate Foods Ltd. (Respondent)

Unit: "all employees of the respondent in its Dempsters Bread Division at their Mississauga Distribution Centre presently located at 6645 Tomken Road in the City of Mississauga, save and except foremen, persons above the rank of foreman, office, sales, driver-salesmen, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (7 employees in unit) (*Having regard to the agreement of the parties*)

1478-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Neal Chevrolet Oldsmobile Cadillac Inc. (Respondent)

Unit: "all employees of the respondent in the City of Niagara Falls, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (20 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1480-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. American Healthcare Manufacturing (Canada) Ltd. (Respondent)

Unit: "all office, clerical and technical employees of the respondent in the City of Brantford, save and except supervisors, persons above the rank of supervisor, personnel assistants and chemists" (22 employees in unit) (*Having regard to the agreement of the parties*)

1507-90-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800 (Applicant) v. Ecodyne Ltd. (Respondent)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in all sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

1508-90-R: Canadian Textile & Chemical Union (Applicant) v. Marietta Canada Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, those above the rank of supervisor and office and sales persons” (65 employees in unit) (*Having regard to the agreement of the parties*)

1511-90-R: London & District Service Workers’ Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Convent Garden Building Inc. (Respondent)

Unit: “all employees of the respondent in London, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (22 employees in unit) (*Having regard to the agreement of the parties*)

1522-90-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Da Costa Forming Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

1552-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Charterways Transportation Ltd. (Respondent)

Unit: “all employees of the respondent in Bowmanville, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, school bus drivers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, and persons in bargaining units for which any trade union held bargaining rights as of September 14, 1990” (23 employees in unit) (*Having regard to the agreement of the parties*)

1562-90-R: Canadian Paperworkers Union (Applicant) v. Robert Windows Inc. (Respondent)

Unit: “all employees of the respondent in Cornwall, save and except foremen, persons above the rank of foreman, servicemen and office and sales staff” (10 employees in unit) (*Having regard to the agreement of the parties*)

1578-90-R: IWA-Canada (Applicant) v. Tri-Fab Container Company (Respondent)

Unit: “all employees of the respondent at 301 Tillson Ave., Tillsonburg, Ontario, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and students employed in a co-operative training program” (94 employees in unit) (*Having regard to the agreement of the parties*)

1591-90-R: United Electrical, Radio and Machine Workers of Canada (U.E.) (Applicant) v. Anchor Cap &

Closure Corporation of Canada Ltd. (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener)

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff, persons regularly employed for not more than 24 hours per week and any employees in bargaining units for which any trade union held bargaining rights as of September 19, 1990" (4 employees in unit) (*Having regard to the agreement of the parties*)

1596-90-R: Shopmen's Local Union, No. 834 of the International Association of Bridge, Structural & Ornamental Ironworkers (AFL-CIO) (Applicant) v. Swing Stage Ltd. (Respondent)

Unit: "all employees of the respondent in the Province of Ontario, save and except non-working foremen, persons above the rank of non-working foreman, sales and engineering, office and clerical staff" (71 employees in unit) (*Having regard to the agreement of the parties*)

1600-90-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. 629629 Ontario Ltd. c.o.b. as P. H. Atlantic Plumbing & Heating (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all sectors of the construction industry in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1643-90-R: Teamsters Local Union, No. 879 (Applicant) v. Browning-Ferris Industries Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Waterloo, save and except supervisor, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (24 employees in unit) (*Having regard to the agreement of the parties*)

1645-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Burgess Wholesale Ltd. (Respondent)

Unit #1: "all employees of the respondent in the City of London, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (43 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in the City of London regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff" (6 employees in unit) (*Having regard to the agreement of the parties*)

1651-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. United Technologies Automotive (Canada) Inc. (Respondent)

Unit: "all employees of the respondent in Whitby, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and students employed during the school vacation period" (18 employees in unit) (*Having regard to the agreement of the parties*)

1659-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Metric Tile Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and car-

penters' apprentices in the employ of the respondent in all sectors of the construction in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1694-90-R: Labourers' International Union of North America, Local 183 (Applicant) v. Delmar Contracting Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

1705-90-R: International Brotherhood of Electrical Workers, Local 402 (Applicant) v. Summit Security Company Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Thunder Bay, save and except foremen, persons above the rank of foreman, office and clerical staff, students employed in a work study program, persons regularly employed for not more than 24 hours per week and during the school vacation period" (5 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0922-90-R: United Steelworkers of America (Applicant) v. AluminArt Products Ltd. (Respondent) v. Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Intervener)

Unit: "all employees of the Company in Brampton, Ontario, save and except lead hands, persons above the rank of lead hand, office and sales staff, truck drivers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (105 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	99
Number of persons who cast ballots	91
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	83
Number of ballots marked in favour of intervener	7

1123-90-R: Amalgamated Clothing & Textile Workers Union, AFL:CIO:CLC: (Applicant) v. Krystal Cap Company Ltd.. (Respondent) v. Local 3 United Headwear, Optical & Allied Workers Union of Canada (Intervener)

Unit: "all employees of the respondent, save and except packers, foreman, office and sales staff, and persons regularly employed for not more than 24 hours per week except the employees who were in the employ of the company on July 01, 1982 who are not regularly employed for more than 24 hours per week" (48 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	43
Number of persons who cast ballots	31
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	25
Number of ballots marked in favour of intervener	5

1186-90-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. G.C. Tech Electrical Services Ltd. (Respondent) v. Christian Labour Association of Canada (Intervener)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction in the Province of Ontario, and all electricians and electricians' apprentices in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of intervener	0

1203-90-R: Canadian Paperworkers Union (Applicant) v. Domtar Inc. (Respondent) v. Teamsters, Local Union No. 879 (Intervener)

Unit: "all employees of the respondent at its Fine Papers Division, Merchant Group, Buntin Gillies in Hamilton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff" (30 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	31
Number of persons who cast ballots	30
Number of ballots marked in favour of applicant	30
Number of ballots marked in favour of intervener	0

1342-90-R: Canadian Union of Public Employees (Applicant) v. Sudbury General Hospital of the Immaculate Heart of Mary (Respondent)

Unit: "all office and clerical employees of the respondent in the City of Sudbury, save and except supervisors, persons above the rank of supervisor, Secretary to the Executive Director, Secretary to the Assistant executive Directors, Secretary to the Director of Finance, Secretary to the Director of Human Resources, Secretary to the Director of Public Relations and Fundraising, payroll clerks, accounting officer, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of August 15, 1990" (81 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	81
Number of persons who cast ballots	73
Number of ballots marked in favour of applicant	41
Number of ballots marked against applicant	32

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0636-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Kautex of Canada Inc. (Respondent)

Unit: "all employees of the respondent in the City of Windsor, save and except supervisors, persons above the rank of supervisor, and office and sales staff" (170 employees in unit)

Number of names of persons on revised voters' list	170
Number of persons who cast ballots	152
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	120
Number of ballots marked against applicant	29
Ballots segregated and not counted	1

0906-90-R: Ontario Public School Teachers' Federation (Applicant) v. North York Board of Education (Respondent)

Unit: "all occasional teaches employed by the respondent in its elementary panel in the City of North York, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*" (178 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	178
Number of persons who cast ballots	47
Number of ballots marked in favour of applicant	43
Number of ballots marked against applicant	4

1058-90-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Burlington Hydro Electric Commission (Respondent)

Unit: "all office, clerical and technical employees of the respondent in Burlington, save and except supervisors, persons above the rank of supervisor, confidential secretaries to the Director of Human Resources, the General Manager and the Chief Engineer, and students employed during the school vacation period" (34 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	34
Number of persons who cast ballots	33
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	32
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	15
Ballots segregated and not counted	1

1100-90-R: Ontario Public Service Employees Union (Applicant) v. Community Living Huronia (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent in the Town of Midland, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (46 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	46
Number of persons who cast ballots	42
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	17

Unit #2: (see *Bargaining Agents Certified Without Vote*)

1181-90-R: London & District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. The Sisters of St. Joseph of the Diocese of London in Ontario, as owner and operator of St. Joseph's Hospital, London, Ontario (Respondent)

Unit: "all lay employees of the respondent at London, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, social workers, social work assistants, persons engaged in research work, technical personnel (including in this exception, graduate and undergraduate audiologists, physio-occupational, psychiatric and speech therapists, psychologists, psychometrists, computer programmers, biomedical repair technicians, certified and non-certified dental assistants, photography technicians and artists -medical illustrators, registered, non-registered and student: laboratory technicians, x-ray technicians, respiratory technicians, electrocardiogram technicians, electroencephalogram technicians, pulmonary technicians, nuclear medicine technicians, ophthalmic technicians, and laboratory assistants), supervisors, persons above the rank

of supervisor, foremen, persons above the rank of foreman, chief engineer, office and clerical staff (including in this exception: ward clerks, admitting clerks, receptionists, safety and security officers, information clerks, mail clerks, cashiers, librarians and switchboard operators), security guards" (182 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	205
Number of persons who cast ballots	108
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	81
Number of ballots marked against applicant	26

Applications for Certification Dismissed Without Vote

0225-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. M.W.M. Construction of Kitchener Ltd. (Respondent) v. Group of Employees (Objectors) (28 employees in unit)

1147-89-R; 2538-89-R; 3067-89-R: United Steelworkers of America (Applicant) v. A-Sharp Services Inc./Services A-Sharp Inc., Pinkerton's of Canada Ltd., Wackenhut of Canada Ltd. (Respondents) v. Group of Employees (Objectors) (133 employees in unit)

2892-89-R: Service Employees Union, Local 663 (Applicant) v. Lennox & Addington Addiction Services (Respondent) v. Employee (Objector) (3 employees in unit)

2904-89-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. 783727 Ontario Ltd. c.o.b. Appelco Interior Contracting (Respondent) (2 employees in unit)

0648-90-R: Ironworkers District Council of Ontario (Applicant) v. Vanderbilt Industrial Contracting Corp. and Industrial Overload Inc. c.o.b. as Drake Industrial Overload (Respondent) (43 employees in unit)

1071-90-R: Ontario Public Service Employees Union (Applicant) v. John Howard Society of Metropolitan Toronto (Respondent) Unit #1 (see *Bargaining Agents Certified Without Vote*); Unit #2 Dismissed (21 employees in unit)

1112-90-R: Canadian Guards Association (Applicant) v. Ottawa Congress Centre/Centre des Congres d'Ottawa (Respondent) (7 employees in unit)

1276-90-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Vanderbilt Industrial Contracting Corp., Drake International Inc. c.o.b. as Drake Industrial Overload, Industrial Overload Inc., and Electrical Control Service (Respondents) v. Ironworkers District Council of Ontario, Local 721 (Intervener) (22 employees in unit)

1467-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Toyota Canada Inc. (Respondent) v. Group of Employees (Objectors) (76 employees in unit)

1536-90-R: United Brotherhood of Carpenters & Joiners of America, Local 38 (Applicant) v. The Consumers Millwork Co. Ltd. (Respondent) (7 employees in unit)

1560-90-R: International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers (Applicant) v. Brisk-All Glass (Respondent) v. Group of Employees (Objectors) (3 employees in unit)

1583-90-R: United Steelworkers of America (Applicant) v. DeBartolo Spring Ltd. (Respondent) (32 employees in unit)

1599-90-R: Labourers' International Union of North America, Local 183 (Applicant) v. Lisbon Paving Company Ltd. (Respondent) (8 employees in unit)

1677-90-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. The Hudson's Bay Company (Respondent) (61 employees in unit)

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0817-90-R: Energy & Chemical Workers Union (Applicant) v. Corundol Environmental Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent working at or out of the Regional Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (18 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	6

0994-90-R: United Steelworkers of America (Applicant) v. Today's Business Products Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, technical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (130 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	108
Number of persons who cast ballots	97
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	46
Number of ballots marked against applicant	49
Ballots segregated and not counted	1

1079-90-R: C.U.P.E. (Applicant) v. Umbrella Family & Child Centres of Hamilton (Respondent)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: "all employees of the respondent in Hamilton, regularly employed for not more than 24 hours per week, save and except centre supervisors, persons above the rank of centre supervisor, and students employed in co-operative education programs" (13 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	8
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	8

1479-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. St. Catharines Machine Products Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in St. Catharines, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (109 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	109
Number of persons who cast ballots	107
Number of ballots marked in favour of applicant	44
Number of ballots marked against applicant	60

Applications for Certification Withdrawn

1884-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. Chex Contracting Ltd. (Respondent) v. Group of Employees (Objectors)

2563-89-R; 2564-89-R: United Food & Commercial Workers International Union, Local 1000A (Applicant) v. Loblaws Supermarkets Ltd., Fortino's Supermarkets Ltd. and Fortino's Vodden Ltd. (Respondents)

0691-90-R: Labourers' International Union of North America, Local 837 (Applicant) v. Landford Bayview Estates Ltd. (Respondent)

0869-90-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Michel Whissell, Vaultex Contractors Ltd., Apex Construction, Silvertrust Inc., Gold Stamp Cabinetmakers Inc., Anarken Inc., Quebefort Inc. and Fred Trottier Construction Ltd. (Respondents)

1011-90-R: Labourers' International Union of North America, Local 183 (Applicant) v. Greenwin Property Management (Respondent)

1199-90-R; 1201-90-R: International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Applicants) v. Support Services Ltd. (Respondent)

1226-90-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Cash & Carry Home Centre (Respondent)

1278-90-R; 1537-90-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Westra Concrete Works and Post Concrete Services (Respondents)

1359-90-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Danmat Mechanical Inc. (Respondent)

1371-90-R: United Brotherhood of Carpenters & Joiners of America, Local 675 (Applicant) v. Ashland Drywall & Acoustics Ltd. (Respondent)

1416-90-R: Ontario Public Service Employees Union (Applicant) v. The Riverdale Hospital (Respondent)

1445-90-R: United Brotherhood of Carpenters & Joiners of America, Local 1669 (Applicant) v. Sentinel Contracting Ltd. 539711 Ontario Ltd. (Respondent)

1513-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Bridgeline Ropes (Respondent)

1520-90-R: Ontario Secondary School Teachers' Federation (Applicant) v. Lambton County Board of Education (Respondent)

1526-90-R: Amalgamated Clothing & Textile Workers Union (Applicant) v. Angelica Uniforms of Canada Ltd. (Respondent)

1548-90-R: Hotel, Motel & Restaurant Employees Union, Local 442 (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 38 (Respondent)

1563-90-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Danmat Mechanical Inc. (Respondent)

1857-90-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Lakehead Board of Education (Respondent)

2019-90-R: International Brotherhood of Painters & Allied Trades, Local 1793 Glaziers (Applicant) v. Low's Glass & Mirror Co. Ltd. (Respondent) v. Christian Labour Association of Canada (Intervener)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

1473-90-FCA: Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 880 (Applicant) v. Canada Building Materials Company (Respondent) (*Granted*)

1679-90-FC: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. N. A. Carpenters Ltd. (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0638-89-R: Syndicat Quebecois de L'Industrie Et Des Communications, Local 145 (Applicant) v. Le Droit, une Division Du Groupe Unimedia Inc. (Respondent) (*Dismissed*)

1071-89-R, 1072-89-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Douglas MacDonald Development Corporation; Douglas Ronald MacDonald, David Colin Anderson and David Victor Spillenaar (Respondents) (*Granted*)

1853-89-R: United Brotherhood of Carpenters & Joiners of America, Local 38 (Applicant) v. Moir Construction Company Ltd., 713518 Ontario Inc., Diamond Stonebridge Holdings Ltd., Diamond Stonebridge Contracting (Respondents) v. Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 837 (Intervener) (*Withdrawn*)

0672-90-R: Millwright District Council of Ontario on its own behalf and on behalf of Local 2309 (Applicant) v. Central Rigging & Contracting Co. (Canada) Ltd.; Central Rigging & Contracting Ltd.; Centrig Industries Inc.; Centre Industries Corp.; Centrig Industrial Contracting Corp.; Vanderbuilt Industrial Contracting Corp. (Respondents) (*Dismissed*)

0677-90-R: Service Employees' International Union, Local 204 (Applicant) v. Willowood Personnel Services Ltd. and 582958 Ontario Ltd. (Respondents) (*Withdrawn*)

0732-90-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Central Rigging & Contracting Corporation; Centrig Industries Inc.; Vanderbilt Industrial Contracting Corp.; Centre Industries Corp.; Centrig Industrial Contracting Ltd.; and Central Rigging & Contracting Ltd. (Respondents) v. Millwright District Council of Ontario on its own behalf and on behalf of Local 2309 (Interveners) (*Dismissed*)

1019-90-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Vanderbilt Industrial Contracting Corp. and Industrial Overload Inc. c.o.b. as Drake Industrial Overload (Respondent) (*Dismissed*)

1089-90-R: United Steelworkers of America (Applicant) v. Marlee Inc.; Raymond, Chabot Inc.; Unikcare Management Inc.; Marcel and Diane Parent (Respondents) (*Withdrawn*)

1316-90-G: Christian Labour Association of Canada (Applicant) v. Stars Electrical & Mechanical Ltd. and 901271 Ontario Ltd. (Respondents) (*Granted*)

1349-90-R; 1350-90-R: Construction Workers Local 53, Christian Labour Association of Canada (Applicant) v. Pro-Ject Mechanical Ltd. and 880161 Ontario Inc. c.o.b. as Wes-Co (London) Mechanical (Respondent) (*Granted*)

1393-90-R: International Brotherhood of Painters & Allied Trades, Local 1824 (Applicant) v. Regional Glass & Mirror Ltd. (Respondent) (*Granted*)

SALE OF A BUSINESS

0637-89-R: Syndicat Quebecois de L'Industrie Et Des Communications, Local 145 (Applicant) v. Le Droit, une Division Du Groupe Unimedia Inc. (Respondent) (*Dismissed*)

1071-89-R, 1072-89-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Douglas MacDonald Development Corporation; Douglas Ronald MacDonald, David Colin Anderson and David Victor Spillenaar (Respondents) (*Granted*)

0671-90-R: Millwright District Council of Ontario on its own behalf and on behalf of Local 2309 (Applicant) v. Central Rigging & Contracting Co. (Canada) Ltd.; Central Rigging & Contracting Ltd.; Centrig Industries Inc.; Centre Industries Corp.; Centrig Industrial Contracting Corp.; Vanderbuilt Industrial Contracting Corp. (Respondents) (*Dismissed*)

0731-90-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Central Rigging & Contracting Corporation; Centrig Industries Inc.; Vanderbilt Industrial Contracting Corp.; Centre Industries Corp.; Centrig Industrial Contracting Ltd.; and Central Rigging & Contracting Ltd. (Respondents) v. Millwright District Council of Ontario on its own behalf and on behalf of Local 2309 (Intervenors) (*Dismissed*)

1090-90-R: United Steelworkers of America (Applicant) v. Raymond, Chabot Inc. and Unikcare Management Inc. c.o.b. as Centre D'Accueil Mon Chez-Nous (Respondents) (*Withdrawn*)

1316-90-G: Christian Labour Association of Canada (Applicant) v. Stars Electrical & Mechanical Ltd. and 901271 Ontario Ltd. (Respondents) (*Granted*)

1349-90-R; 1350-90-R: Construction Workers Local 53, Christian Labour Association of Canada (Applicant) v. Pro-Ject Mechanical Ltd. and 880161 Ontario Inc. c.o.b. as Wes-Co (London) Mechanical (Respondent) (*Granted*)

1393-90-R: International Brotherhood of Painters & Allied Trades, Local 1824 (Applicant) v. Regional Glass & Mirror Ltd. (Respondent) (*Granted*)

1409-90-R: Hotel & Restaurant Employees & Bartenders Union, Local 604, A.F., C.I.O. and C.L.C. (Applicant) v. 736207 Ontario Ltd. c.o.b. as Walsh's (Respondent) (*Withdrawn*)

CROWN TRANSFER ACT

2339-88-R: Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario as represented by the Ministry of Transportation and E & W Blane Truck & Exc. Ltd. (Respondents) (*Granted*)

UNION SUCCESSOR RIGHTS

1204-90-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Rochester (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2647-89-R: Kevan Evans (Applicant) v. National Association of Broadcast Employees & Technicians (Respondent) v. VTR Productions Ltd. (Intervener)

Unit: "all employees of VTR Productions Limited classified as VTR operator, CCU operator, cameraman, audio operator, switcher, technical co-ordinator supervisor, VTR operator and editor, telerecorder operator, maintenance technician, telerecorder supervisor, VTR operator and truck driver, cameraman and truck

driver, *excluding* the general manager, chief engineer, production co-ordinator and switchboard operator (temporary)" (11 employees in unit) (*Having regard to the agreement of the parties*) (*Dismissed*)

Number of names of persons on revised voters' list	49
Number of persons who cast ballots	48
Number of ballots marked in favour of respondent	25
Number of ballots marked against respondent	23

2802-89-R: Dorothy Johnson (Applicant) v. Health, Office & Professional Employees, A Division of Local 175, United Food & Commercial Workers International Union, chartered by the United Food & Commercial Workers International Union, C.L.C., A.F.L. - C.I.O. (Respondent) v. Tyndall Nursing Home Ltd. (Intervener)

Unit: "all employees of Tyndall Nursing Home Limited in Mississauga, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff and registered and graduate nurses" (11 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	9

3091-89-R: Vernon Alexander Cunningham et al (Applicant) v. The Operative Plasterers' & Cement Masons' International Association of the United States & Canada, Local 172 (Respondent)

Unit: "all employees of the Company in its plants and construction sites in the province of Ontario, save and except non-working foremen, those above the rank of non-working foreman, sales and engineering staff and office staff" (64 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	64
Number of persons who cast ballots	54
Number of ballots marked in favour of respondent	6
Number of ballots marked against respondent	48

0184-90-R: Alan Reitzel (Applicant) v. Christian Labour Association of Canada (Respondent)

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the Reitzel Heating and Sheet Metal Ltd. in the industrial, commercial and institutional sector of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	4

0225-90-R: Alan Reitzel (Applicant) v. Sheet Metal Workers' International Association, the Ontario Sheet Metal Workers' Conference and Sheet Metal Workers' International Association, Locals 30, 47, 235, 392, 397, 473, 504, 537, 539, 562, & 269 (Respondents)

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the Reitzel Heating and Sheet Metal Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario excluding the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township) (i.e. Board Area 6), save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit) (*Granted*)

Number of names of persons on revised voters' list

4

Number of persons who cast ballots	4
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	4

0265-90-R: Robert McCardle (Applicant) V. International Union of Operating Engineers, Local 793 (Respondent) v. 369150 Ontario Ltd. c.o.b. B-4 Equipment (Intervener)

Unit: "all construction employees engaged in the engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, excluding the industrial, commercial and institutional sector of the construction industry, save and except shop and yard employees, mechanics, non-working foreman and persons above the rank of non-working foreman and students employed during the school vacation period in Ontario, Labour Relations Board Area #9, [the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria]" (2 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2

0804-90-R: Jim Jewell (Applicant) v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. The Hostess Frito-Lay Company (Intervener)

Unit: "all employees of the intervener, including warehousemen, at Windsor and Leamington, Ontario, save and except route supervisors, persons above the rank of route supervisor, office staff, students hired for the school vacation period, and persons regularly employed for not more than 24 hours per week" (20 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	16
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	11

0911-90-R: Douglas M. Garvie (Applicant) v. International Brotherhood of Electrical Workers and the I.B.E.W. Construction Council of Ontario, Local 586 (Respondent) v. Electro Systems a Division of 433281 Ontario Inc. (Intervener) (2 employees in unit) (*Granted*)

1220-90-R: Wm Richard Barrett (Applicant) v. Canadian Brotherhood of Railway, Transport & General Workers (Respondent) v. Can-Ar Coach Service Div. of Tokmakjian Ltd. (Intervener) (*Withdrawn*)

1370-90-R: Greg Wood (Applicant) v. United Food & Commercial Workers International Union, AFL-CIO-CLC (Respondent) v. Royal Mattress Ltd. (Intervener) (14 employees in unit) (*Granted*)

1413-90-R: Heather Medernach and Lyn Reimer (Applicants) v. Christian Labour Association of Canada (Respondent) v. Queenchester Terrace (owned by Kendix Ltd.) (Intervener) (*Withdrawn*)

1506-90-R: Elgin Shantz on behalf of the employees of K. Schmitt Electric (Applicant) v. International Brotherhood of Electrical Workers, Local 804 (Respondent) v. Keith Schmitt (Intervener) (*Withdrawn*)

1558-90-R: Wyane R. Meade (Applicant) v. International Brotherhood of Electrical Workers, Local 2228 (Respondent) (*Withdrawn*)

1642-90-R: Daniel K. Tippin (Applicant) v. Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union No. 141 (Respondent) v. Trudell Medical (Intervener) (6 employees in unit) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0787-90-U: Northfield Metal Products Ltd. (Applicant) v. Glass, Molders, Pottery, Plastics & Allied Workers International Union, (A.F.L. - C.I.O. - C.L.C.) (Respondent) (*Dismissed*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1856-87-U; 2246-87-U; 2568-88-U: Syndicat Quebecois De L'Imprimerie Et De Communications, Local 145 (Complainant) v. Le Droit, Division De Groupe Unimedia Inc. (Respondent) (*Dismissed*)

1928-87-U: John Henson & 25 others (Complainants) v. United Food & Commercial Workers International Union, AFL:CIO:CLC:, United Food & Commercial Workers International Union, Local 175 and Cuddy Food Products Ltd. (Respondents) v. Deb Johnston and others (Interveners) (*Dismissed*)

2911-87-U: Gilbert Perry et al. (Complainants) v. United Food & Commercial Workers International Union, AFL:CIO:CLC:, United Food & Commercial Workers International Union, Local 175 and Cuddy Food Products Ltd. (Respondents) (*Withdrawn*)

2895-88-U: The Coalition of Laid-off Workers, Ontario, Canada. Hereinafter known as the C.L.W. (Complainant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada. Hereinafter known as the C.A.W., Locals 439 & 458 of the C.A.W. (Respondents) v. Varsity Corporation (Intervener) (*Dismissed*)

3162-88-U: The Persons listed in Schedule A (Complainants) v. United Food & Commercial Workers International Union, AFL:CIO:CLC: and United Food & Commercial Workers International Union, Local 175 and Cuddy Food Products Ltd. (Respondents) (*Dismissed*)

0266-89-U: Labourers' International Union of North America, Ontario Provincial District Council (Complainant) v. M.W.M. Construction of Kitchener Ltd. (Respondent) (*Dismissed*)

817-89-U: International Brotherhood of Electrical Workers, Local 804 (Complainant) v. Del-Co Electrical Ltd. (Respondent) (*Dismissed*)

1555-89-U: United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. Siding I.P.E. Ltd. (Respondent) (*Dismissed*)

1684-89-U: Lennox Sukdeo (Complainant) v. The Schneiders Employees' Association (Respondent) v. J. M. Schneider Inc. (Intervener) (*Dismissed*)

1697-89-U: United Steelworkers of America (Complainant) v. Shirley Ann Boydell (Respondent) (*Withdrawn*)

1852-89-U: United Brotherhood of Carpenters & Joiners of America, Local 38 (Complainant) v. Labourers' International Union of North America, Local 837, and Diamond Stonebridge Contracting (Respondents) (*Withdrawn*)

2284-89-U: West Fort William Credit Union Ltd. (Complainant) v. Office & Professional Employees International Union, Local 81 (Respondent) (*Withdrawn*)

2311-89-U: Teamsters, Chauffeurs, Warehousemen & Helpers, Local 91 (Complainant) v. Trans Continental Printing Inc. (Respondent) (*Withdrawn*)

2581-89-U: International Union of Operating Engineers, Local 793 (Complainant) v. Chex Contracting Ltd. (Respondent) (*Withdrawn*)

3029-89-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Johnson Controls Ltd. (Respondent) (*Withdrawn*)

3069-89-U: United Brotherhood of Carpenters & Joiners of America, Local 93 (Complainant) v. Vaultex Contractors Ltd. (Respondent) (*Withdrawn*)

3206-89-U: Michael Crowder (Complainant) v. United Food & Commercial Workers International Union, Locals 175/633 (Respondent) (*Withdrawn*)

3228-89-U: Communications & Electrical Workers of Canada, Local 520 (Complainant) v. Universal Grinding Wheel Division Unicorn Abrasives of Canada Ltd. (Respondent) (*Withdrawn*)

3270-89-U: United Steelworkers of America (Complainant) v. Valco Furniture Ltd. (Respondent) (*Withdrawn*)

0046-90-U: Labourers' International Union of North America, Local 183 (Complainant) v. Westdale Properties, A Limited Partnership and/or Westdale Construction Co. Ltd. and/or M. Kimel Realty (Respondents) (*Withdrawn*)

0065-90-U: Ontario Secondary School Teachers' Federation (Complainant) v. The Carleton Board of Education (Respondent) (*Withdrawn*)

0203-90-U: Joseph R. Wills (Complainant) v. Labourers' International Union of North America, Local 527 (Respondent) (*Withdrawn*)

0254-90-U: General Motors of Canada Ltd. (Complainant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), CAW Local 222, Tom Hoar, John Sinclair, Frank Taylor, Ken Sutherland, Dean Lindsay, Maxwell Pollard, Wayne Robinson, M. McHolm, G. Knapp, T. Turner and P. McGee (Respondents) (*Withdrawn*)

0370-90-U: Angelo Loberto (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local 3054 (Respondent) v. Robert Hunt Corporation (Intervener) (*Withdrawn*)

0379-90-U: Bryan R. McLean (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local 3054 (Respondent) v. Robert Hunt Corporation (Intervener) (*Withdrawn*)

0434-90-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 673 (Complainants) v. Bourque Consumer Electronics Service Inc. and Mr. Pierre Bourque (Respondents) (*Granted*)

0730-90-U: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Complainant) v. Central Rigging & Contracting Corporation, Centrig Industries Inc., Vanderbilt Industrial Contracting Corp., Centre Industries Corp., Centrig Industrial Contracting Ltd. and Central Rigging & Contracting Ltd. (Respondents) v. Millwright District Council of Ontario on its own behalf and on behalf of Local 2309 (Interveners) (*Dismissed*)

0736-90-U: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild (C.L.C., A.F.L.-C.I.O.) (Complainant) v. The Cambridge Reporter, A Division of Canadian Newspapers Company Ltd. (Respondent) (*Withdrawn*)

0795-90-U: William Michael Devlin (Complainant) v. United Transportation Union 917 (Respondent) (*Withdrawn*)

0797-90-U: William Egan (Complainant) v. District Council 46, International Brotherhood of Painters & Allied Trades (Respondent) (*Withdrawn*)

0899-90-U: United Steelworkers of America (Complainant) v. Benoma Metal Products Ltd. (Respondent) (*Withdrawn*)

0903-90-U: Michael Kerkman Gains (Complainant) v. Fisher Gauge Ltd. (Respondent) v. Independent Union of Precision Diecasters (Intervener) (*Withdrawn*)

0925-90-U: Christopher Clayton and Giuseppi Tocci (on their own behalf and on behalf of all petitioners) (Complainants) v. United Steelworkers of America, Brando Paris (Union Official) and Harjit Sidhu (President of the local union at the plant) (Respondents) (*Withdrawn*)

0954-90-U: National Association of Broadcast Employees & Technicians (Complainant) v. VTR Productions Ltd. (Respondent) (*Withdrawn*)

1005-90-U: Fitzroy Dean (Complainant) v. Sealy Upholstery Canada (Respondent) v. Laundry & Linen Drivers & Industrial Workers, Local 847 Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Intervener) (*Dismissed*)

1094-90-U; 1095-90-U; 1169-90-U; 1228-90-U; 1577-90-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Kautex Canada Inc. (Respondent) (*Withdrawn*)

1097-90-U: Teamsters Local Union No. 879 (Complainant) v. Guelph Daily Mercury (Respondent) (*Withdrawn*)

1104-90-U: Ontario Nurses' Association (Complainant) v. University of Guelph (Respondent) (*Withdrawn*)

1131-90-U: Ms. Linda Lena Vail (Complainant) v. United Food & Commercial Workers, Local 550A and Mott's Canada (Respondent) (*Withdrawn*)

1134-90-U: United Steelworkers of America (Complainant) v. Marlee Inc. c.o.b. as Centre D'Acceuil Mon Chez Nous; Raymond, Chatob Inc.; Unikcare Management Inc.; Marcel and Diane Parent (Respondents) (*Withdrawn*)

1135-90-U: United Steelworkers of America (Complainant) v. Maxville Manor (Respondent) (*Withdrawn*)

1266-90-U: Ontario Nurses' Association (Complainant) v. Craigholme Nursing Home (Respondent) (*Withdrawn*)

1273-90-U: William P. Dolan (Complainant) v. C.U.P.E., Local 503 (Respondent) (*Withdrawn*)

1283-90-U: International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Complainant) v. Support Services Ltd. (Respondent) (*Withdrawn*)

1300-90-U: Toronto Typographical Union, Number 91 Printing Publishing, & Media Workers Sector of the Communications Workers of North America (Complainant) v. Alpha Graphics Ltd. (Respondent) (*Withdrawn*)

1313-90-U: Galina Bugaeva (Complainant) v. Toronto Musicians' Association, Local 149 (American Federation of Musicians) and the Toronto Symphony (Respondent) (*Withdrawn*)

1336-90-U: Lillian Anderson (Complainant) v. Tarxien Ltd. (Respondent) (*Withdrawn*)

1339-90-U: James M. Smith (Complainant) v. Carl Chatterton - Union Representative and Dock Foreman Union UFCW Local 818 (Respondent) (*Withdrawn*)

1340-90-U; 1341-90-U: London & District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Complainant) v. Cedarwood Village (Respondent) (*Withdrawn*)

1362-90-U: Yvonne L. Arseneault and CUPE 1000 (Complainants) v. Ontario Hydro Kenora Area (Respondent) (*Withdrawn*)

1365-90-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Standard Products (Canada Ltd.) and Goldstar Services (Respondents) (*Withdrawn*)

1379-90-U: International Brotherhood of Electrical Workers, Local 353 (Complainant) v. Internazionale Electrical Contractors Ltd. (Respondent) (*Withdrawn*)

1391-90-U: London & District Service Workers Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Complainant) v. Country Terrace Nursing Home (Respondent) (*Withdrawn*)

1395-90-U: International Brotherhood of Electrical Workers, Local 115 (Complainant) v. Beehler Brothers Electrical Contractors Ltd. (Respondent) (*Withdrawn*)

1408-90-U: Randy Sookhoo (Complainant) v. International Wallcoverings Ltd. and Canadian Paperworkers' Union, CLC Local 305 (Respondents) (*Dismissed*)

1421-90-U; 1640-90-U: Graphic Communications International Union, Local 588 and Geoff Groulx (Complainants) v. Trans-Continental Printing Inc. (Respondent) (*Withdrawn*)

1422-90-U: Canadian Paperworkers Union (Complainant) v. Buntin-Gillies a Division of Domtar Inc. (Respondent) (*Withdrawn*)

1433-90-U: Christopher Robin Garrish (M5366) (Complainant) v. Rob Gardiner, Labour Relations, Chrysler Canada and Jim Bennet, Area Manager, Chrysler Canada (Respondents) (*Withdrawn*)

1442-90-U: William Nikita (Complainant) v. Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 880 (Respondent) (*Withdrawn*)

1463-90-U: United Brotherhood of Carpenters & Joiners of America, Local 93 (Complainant) v. M.C.Y. Construction Ltd. (Respondent) (*Granted*)

1466-90-U: Labourers' International Union of North America, Local 1059 (Complainant) v. Touchstone Masonry Ltd. (Respondent) (*Withdrawn*)

1474-90-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. 535052 Ontario Ltd. c.o.b. Delrose Retirement Residence (Respondent) (*Withdrawn*)

1483-90-U: Teamsters, Local Union No. 419 (Complainant) v. Seb Canada Inc. (Respondent) (*Withdrawn*)

1504-90-U: Edward B. Rice (Complainant) v. C.U.P.E., Local 3098 and Windsor Housing Authority (Respondents) (*Withdrawn*)

1514-90-U: Robert J. Sardone (Complainant) v. C.U.P.E., Local 942 (Respondent) (*Withdrawn*)

1523-90-U: Andrew Ryan (Complainant) v. McIsaac Mining and U.S.W.A., Local 8126 (Respondents) (*Withdrawn*)

1525-90-U: Bertrand F. Bennett (Complainant) v. Brewers Retail Inc. (Respondent) (*Withdrawn*)

1538-90-U: Labourers' International Union of North America, Local 1059 (Complainant) v. Westra Concrete Works & David Westra (Respondents) (*Withdrawn*)

1551-90-U: Association of Allied Health Professionals: Ontario (Complainant) v. Renfrew County & District Health Unit (Respondent) (*Withdrawn*)

1557-90-U: Ralph Harrison (Complainant) v. Teamsters Local #230 - Executive Board Trustees of the Teamsters & Construction Workers Benefit Plan (Respondents) (*Withdrawn*)

1559-90-U: Irene Gauthier (Complainant) v. I.W.A. - Canada, Local 1-1000 (Respondent) (*Dismissed*)

1567-90-U: Teamsters Union, Local 141 (Complainant) v. Co-Fo Concrete Forming Construction Ltd. et al (Respondents) (*Withdrawn*)

1637-90-U: Grace Wadud (Complainant) v. Newmarket & District Association for Community Living (Respondent) (*Dismissed*)

1671-90-U: Muneshwar Mohabir (Mike) (Complainant) v. C.A.W., Canadian Auto Workers, and Signtech Inc. (Respondents) (*Withdrawn*)

1674-90-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Susan Shoe Industries Ltd. (Respondent) (*Withdrawn*)

1691-90-U: Hotel, Motel & Restaurant Employees Union, Local 442 (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local 38 (Applicant) (*Withdrawn*)

1741-90-U: Bakery, Confectionery & Tobacco Workers Int'l Union, Local 322 (Complainant) v. Bronson Bakery Ltd. (Respondent) (*Withdrawn*)

1744-90-U: Mechanical Contractors Association Ontario and Mechanical Contractors Association Sudbury (Complainant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800; Michael Zangari; Copper Cliff Mechanical and Steel Fabricating Ltd.; Peter Matusch; Marvin Firth; Bill Henderson; Sheaffer-Townsend Mechanical-Electrical Ltd.; Jack Donaldson; and Robert Barnes (Respondents) (*Withdrawn*)

1767-90-U; 1768-90-U: London & District Service Workers' Union, Local 220 (Complainant) v. Steeves & Rozema Enterprises Ltd. (Respondent) (*Withdrawn*)

1838-90-U: Robert R. Hopps (Complainant) v. Mr. George Novak (Chairman UPGWA 1981) and Mr. Terry De Young (Manager GM. Plant Security) (Respondents) (*Withdrawn*)

1843-90-U: International Brotherhood of Painters & Allied Trades, Local 1795 Glaziers (Complainant) v. Brisk-All Glass, A Division of Brisk-All Contracting Ltd. (Respondent) (*Withdrawn*)

1871-90-U: Amalgamated Clothing & Textile Workers Union (Complainant) v. Permark Inc. (Respondent) (*Withdrawn*)

1926-90-U: Mr. Ljubisa Dulic (Complainant) v. Workman's Compensation Board (Respondent) (*Dismissed*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

0623-90-M: Peter C. Erb (Applicant) v. Wilfrid Laurier University Faculty Association (Respondent Trade Union) v. Wilfrid Laurier University (Respondent Employer) (*Withdrawn*)

FINANCIAL STATEMENT

0801-90-M; 0802-90-M; 0803-90-M: Clifford Koabel Representing Members of Teamsters, Local 879 (as per attached) and M.T.I.R.B. Members 938, 880, 141, 91 Locals (Complainant) v. Joseph Contardi - President, Local 879 Teamsters, Robert Evans - Secretary Treasurer, Local 879 Teamsters, Murray G. Bulger - Administrative Service Ltd. (Respondents) (*Withdrawn*)

JURISDICTIONAL DISPUTES

3231-89-JD: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Complainant) v. Comstock International Ltd. and Ontario Sheet Metal Workers' & Roofers' Conference and Sheet Metal Workers' International Association, Local 504 (Respondents) (*Withdrawn*)

0835-90-JD: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Complainant) v. Dominion Bridge Company Ltd. and Local 721, International Association of Bridge, Structural & Ornamental Ironworkers (Respondents) (*Withdrawn*)

0919-90-JD: P.J. Daly Contracting Ltd. (Complainant) v. Labourers' International Union of North America, Local 837 and The United Brotherhood of Carpenters & Joiners of America, Local 18 (Respondents) (*Withdrawn*)

1426-90-JD: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 508 (Complainant) v. Labourers' International Union of North America, Local 1036 and George Stone & Sons (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2383-89-M: Canadian Union of Public Employees, Local 1146 (Applicant) v. Oxford County Board of Health (Respondent) (*Dismissed*)

2766-89-M: The Timmins Board of Education (Applicant) v. The Office & Professional Employees International Union, Local 429 (Respondent) (*Withdrawn*)

3257-89-M: Saint Joseph's General Hospital (Applicant) v. Ontario Nurses' Association, Local 3 (Respondent) (*Dismissed*)

0786-90-M: Metropolitan Toronto Police Association (Applicant) v. Office & Professional Employees International Union, Local 343 (Respondent) (*Withdrawn*)

1148-90-M: The City of Owen Sound (Applicant) v. Canadian Union of Public Employees, Local 1189 (Respondent) (*Withdrawn*)

1178-90-M: Ken Hall, Local 230, Member (Applicant) v. Ben Loughlin, Secretary/Treasurer Teamsters, Local 230 (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2706-88-OH: Joseph Burak (Complainant) v. The Corporation of the City of Mississauga (Transit Department) (Respondent) (*Withdrawn*)

2096-89-OH: Steve Mike Szeghalmi (Complainant) v. National Plastic Profiles Inc. (Respondent) (*Dismissed*)

2542-89-OH: Paul Heath (Complainant) v. The Ministry of Corrections Deputy Minister; Mr. D. Bolton, Regional Personnel (W); Mr. Nelmes Super. (Guelph); Mr. Morris, Deputy Super. (Guelph); Mr. De Grandis, Super. (Bluewater); Mr. Peter Kurlik, Supervisor (Bluewater) (Respondents) (*Withdrawn*)

0106-90-OH: Henry Haines (Complainant) v. Hanson Inc. (Respondent) v. United Steelworkers of America, Local 14183 (Intervener) (*Dismissed*)

0912-90-OH: Robert Carl Wallace (Complainant) v. Sidbec Dosco Inc., Mr. Dave MacKay (Respondent) (*Withdrawn*)

1153-90-OH: Mr. M. Bhardwaj (Complainant) v. Mr. Martin Whitlock (Respondent) (*Withdrawn*)

1154-90-OH: Mr. M. Bhardwaj (Complainant) v. Mr. John Hawthorne (Respondent) (*Withdrawn*)

1223-90-OH; 1224-90-OH: Ivan Wilson (Complainant) v. James Dick and Bob Crews (Respondents) (*Withdrawn*)

1375-90-OH: Sven C. Steindorff (Complainant) v. Gerling Global General Insurance Company (Respondent) (*Withdrawn*)

1579-90-OH: Joe Tremmel (Complainant) v. Emco Products (Respondent) (*Withdrawn*)

1672-90-OH: Joan A. Rampersad (Complainant) v. Pickering College (Respondent) (*Withdrawn*)

1803-90-OH: Ian D. Cope (Complainant) v. INA Bearing Company Ltd. (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

0787-89-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Thomas Fuller Construction Co. (1958) Ltd. (Respondent) (*Withdrawn*)

2142-89-G: United Brotherhood of Carpenters & Joiners of America, Local 1669 (Applicant) v. Trident Construction Alberta (1986) Ltd. (Respondent) (*Granted*)

2201-89-G: Ontario Allied Construction Trades Council (Applicant) v. The Electrical Power Systems Construction Association and Yarzab Brothers Ltd. (Respondents) (*Granted*)

2298-89-G: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Paintright Decorators (A Division of 437583 Ontario Ltd.) c.o.b. as Paintall Decorators (Respondent) (*Withdrawn*)

2813-89-G: Ontario Sheet Metal Workers' & Roofers' Conference and Sheet Metal Workers' International Association, Local 504 (Applicants) v. Comstock Canada (Respondent) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Intervener) (*Withdrawn*)

2853-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Cliffside Utility Contractors Ltd. (Respondent) (*Withdrawn*)

2865-89-G: Ontario Allied Construction Trades Council (Applicant) v. The Electrical Power Systems Construction Association (Respondent) (*Granted*)

3057-89-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Vaultex Contractors Ltd. (Respondent) (*Withdrawn*)

0207-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Ta-Mari Construction Ltd. (Respondent) (*Granted*)

0415-90-G: Labourers' International Union of North America (Applicant) v. George Stone & Sons (Respondent) (*Withdrawn*)

0427-90-G: Bricklayer's & Mason's Union No. 1 (Applicant) v. Cardinal Refractories Division of Audience Canada Inc. (Respondent) (*Granted*)

0442-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. PCL Constructors Eastern Inc. (Respondent) (*Withdrawn*)

0492-90-G: International Brotherhood of Painters & Allied Trades and the Ontario Council of the International Brotherhood of Painters & Allied Trades, Local 1494 (Applicant) v. Kite Painting Company Ltd. (Respondent) (*Withdrawn*)

0669-90-G: United Brotherhood of Carpenters & Joiners of America, Local 1669 (Applicant) v. Progressive Home Builders (Respondent) (*Withdrawn*)

0670-90-G: Millwright District Council of Ontario on its own behalf and on behalf of Local 2309 (Applicant) v. Central Rigging & Contracting Co. (Canada) Ltd.; Central Rigging & Contracting Ltd.; Centrig Industries Inc.; Centre Industries Corp.; Centrig Industrial Contracting Corp.; Vanderbuilt Industrial Contracting Corp. (Respondents) (*Dismissed*)

0729-90-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Central Rigging & Contracting Co. (Canada) Ltd.; Centrig Industries Inc.; Vanderbuilt Industrial Contracting Corp.; Centre Industries Corp.; Centrig Industrial Contracting Corp.; Central Rigging & Contracting Ltd. (Respondents) v. Millwright District Council of Ontario on its own behalf and on behalf of Local 2309 (Intervenors) (*Dismissed*)

0826-90-G; 0827-90-G: Ontario Provincial Council International Brotherhood of Painters & Allied Trades, Local 1904 (Applicant) v. C.H. Heist Ltd. (Respondent) (*Withdrawn*)

0829-90-G: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128 Dominion Bridge Company Ltd. (Respondent) (*Withdrawn*)

0863-90-G: International Brotherhood of Electrical Workers, Local 402 (Applicant) v. Prezio Electric Ltd. (Respondent) (*Withdrawn*)

0868-90-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Ed Brunet et Fils Ltee. (Respondent) (*Withdrawn*)

0930-90-G: International Brotherhood of Painters & Allied Trades District Council 46 (Applicant) v. J.C.P. Painting & Associates (Respondent) (*Granted*)

1077-90-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondent) (*Withdrawn*)

0192-90-G; 1093-90-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Bellai Bros. (Respondent) (*Withdrawn*)

1175-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Pit-On Construction Co. Ltd. (Respondent) (*Withdrawn*)

1215-90-G; 1286-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. MacDero Construction Ltd. (Respondent) (*Withdrawn*)

1255-90-G; 1256-90-G; 1462-90-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. M.C.Y. Construction Ltd. (Respondent) (*Granted*)

1294-90-G: Sheet Metal Workers' International Association, Local 562 (Applicant) v. Binks Manufacturing Co. of Canada Ltd. (Respondent) (*Granted*)

1387-90-G: United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. McKay Cocker Construction Ltd. (Respondent) (*Withdrawn*)

1388-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Generation Carpentry Contractors Ltd. (Respondent) (*Withdrawn*)

1414-90-G: Sheet Metal Workers' International Association, Local 504 (Applicant) v. May Heating & Ventilating (Respondent) (*Withdrawn*)

1419-90-G: Sheet Metal Workers' International Association, Local 504 (Applicant) v. Trans-North Industrial Siding (1989) Inc. (Respondent) (*Granted*)

1420-90-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Ritz Metal Erectors (Respondent) (*Withdrawn*)

1430-90-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Plan Electric (Respondent) (*Withdrawn*)

1431-90-G: United Brotherhood of Carpenters & Joiners of America, Local 446 (Applicant) v. Samson Construction, General Contractors Ltd. (Respondent) (*Withdrawn*)

1437-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. 720419 Ontario Ltd. o/a L.P.S. Excavating & Grading (Respondent) (*Withdrawn*)

1440-90-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Dadcon Construction Ltd. (Respondent) (*Withdrawn*)

1456-90-G: Labourers' International Union of North America, Local 506 (Applicant) v. David's (Grovedale) Construction Ltd. (Respondent) (*Granted*)

1488-90-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. 854858 Ontario Inc. (Respondent) (*Granted*)

1489-90-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Double E Construction Ltd. (Respondent) (*Withdrawn*)

1491-90-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. E.G.M. Cape & Company Ltd. (Respondent) (*Withdrawn*)

1493-90-G: Labourers' International Union of North America, Local 607 (Applicant) v. Venshore Mechanical Ltd. (Respondent) (*Withdrawn*)

1518-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. 607015 Ontario Inc. (Respondent) (*Withdrawn*)

1529-90-G: United Brotherhood of Carpenters & Joiners of America, Local 1669 (Applicant) v. Nicholls Radtke & Association Ltd. (Respondent) (*Withdrawn*)

1531-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Rex Forming Ltd. (Respondent) (*Granted*)

1532-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. FXTX Installations (Respondent) (*Withdrawn*)

1533-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Begg & Daigle Store & Office Interiors Inc. (Respondent) (*Withdrawn*)

1534-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. New Vision Construction Co. Ltd. (Respondent) (*Withdrawn*)

1535-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. A.M.L. Advanced Management Ltd. (Respondent) (*Withdrawn*)

1544-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Bondfield Construction Company (1983) Ltd. (Respondent) (*Withdrawn*)

1554-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Bennington Construction Co. Ltd. (Respondent) (*Withdrawn*)

1565-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Eclipse Excavating & Sales Ltd.; and Salvador Excavating Ltd. (Respondent) (*Granted*)

1566-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. John Maggio Excavating Ltd. (Respondent) (*Withdrawn*)

1574-90-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Keet-A-Co. Ltd. (Respondent) (*Withdrawn*)

1576-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Blue-Con Construction Inc. (Respondent) (*Withdrawn*)

1582-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Power Pac Construction Co. Ltd. (Respondent) (*Granted*)

1592-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Paul Anderson o/a BST Contracting 555696 Ontario Ltd. o/a BST Contracting (Respondent) (*Granted*)

1595-90-G: Ontario Allied Construction Trades Council and Labourers' International Union of North America, Local 1059 (Applicant) v. Ontario Hydro; Electrical Power Systems Construction Association; Berken Construction Inc. (Respondents) (*Withdrawn*)

1598-90-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Plan Electric Co. (Respondent) (*Withdrawn*)

1606-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Laurier Homes Ltd. (Respondent) (*Withdrawn*)

1649-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. J. P. Hendricks Construction Corp. (Respondent) (*Granted*)

1655-90-G: Labourers' International Union of North America, Local 506 (Applicant) v. Eton Construction Ltd. (Respondent) (*Withdrawn*)

1657-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Geometric Design Woodwork (Respondent) (*Granted*)

1661-90-G: International Brotherhood of Electrical Workers, Local 804 of the IBEW Construction Council of Ontario (Applicant) v. Sutherland & Schultz Electric (Respondent) (*Withdrawn*)

1668-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Hi-Road Earthmoving Inc. (Respondent) (*Granted*)

1680-90-G: Sheet Metal Workers' International Association, Local 473 (Applicant) v. Lor-Don Ltd. (Respondent) (*Withdrawn*)

1683-90-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Colvale Construction (Respondent) (*Granted*)

1685-90-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Alpine Drywall & Plastering (Ontario Ltd. (Respondent) (*Granted*)

1688-90-G: International Brotherhood of Painters & Allied Trades, Local 1795 Glaziers (Applicant) v. A N H Glass Ltd./Aspen Glass & Mirror (Respondent) (*Granted*)

1690-90-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Acme Plumbing & Heating (Respondent) (*Granted*)

1696-90-G: Labourers' International Union of North America, Local 527 (Applicant) v. Uniform Developments & Leasing Ltd. (Respondent) (*Granted*)

1702-90-G: International Brotherhood of Painters & Allied Trades, Local 1795 Glaziers (Applicant) v. Brisk - All Glass A Division of Brisk - All Contracting Ltd. (Respondent) (*Granted*)

1709-90-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Opec Drywall (Respondent) (*Withdrawn*)

1710-90-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Network Drywall Group Inc. (Respondent) (*Withdrawn*)

1712-90-G: Labourers' International Union of North America, Local 506 (Applicant) v. Greenspoon Brothers (Respondent) (*Withdrawn*)

1713-90-G: Labourers' International Union of North America, Local 506 (Applicant) v. Teperman & Sons Inc. (Respondent) (*Withdrawn*)

1728-90-G: United Brotherhood of Carpenters & Joiners of America, Lake Ontario District Council (Applicant) v. San Lee Contractors & Forming Inc. (Respondent) (*Granted*)

1742-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. 564712 Ontario Inc. c.o.b. as Eagle Earth Moving (Respondent) (*Granted*)

1749-90-G: Sheet Metal Workers' International Association, Local 397 (Applicant) v. Bluebird Construction (515112 Ontario Ltd.) (Respondent) (*Withdrawn*)

1762-90-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. M & M Brothers Contracting Ltd. (Respondent) (*Granted*)

1763-90-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Alstate Drywall Systems Ltd. (Respondent) (*Granted*)

1765-90-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Network Drywall Group Inc. (Respondent) (*Granted*)

1771-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Regal Forming Ltd. (Respondent) (*Withdrawn*)

1773-90-G: Labourers' International Union of North America, Local 607 (Applicant) v. Concrete Walls (Lakehead) 1983 Ltd. (Respondent) (*Granted*)

1780-90-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Cameron McIndoo Interiors Ltd. (Respondent) (*Withdrawn*)

1783-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. North York Construction Ltd. (Respondent) (*Granted*)

1804-90-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Traugott Construction (Kitchener) Ltd. (Respondent) (*Withdrawn*)

1808-90-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. T.E. Taylor Construction Ltd. (Respondent) (*Withdrawn*)

1809-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. United Lands Corporation Ltd. (Respondent) (*Withdrawn*)

1818-90-G: Ontario Allied Construction Trades Council and its affiliate International Union of Operating Engineers, Local 793 (Applicant) v. Electrical Power Systems Construction Association, Ontario Hydro (Respondents) (*Dismissed*)

1833-90-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. St. Clair Roofing & Tinsmithing Inc. (Respondent) (*Granted*)

1855-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Scaff-Tech Ltd. (Respondent) (*Withdrawn*)

1856-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Babcock & Bradley Ltd. (Respondent) (*Withdrawn*)

1858-90-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. DBN Drywall & Acoustics Ltd. (Respondent) (*Withdrawn*)

1874-90-G: Labourers' International Union of North America, Local 506 (Applicant) v. Big H. Construction (Respondent) (*Withdrawn*)

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1542-84-U: Reuben Johnson (Complainant) v. United Electrical, Radio & Machine Workers of Canada (UE) (Travailleurs Unis de l'Electricite, Radio et Machinerie du Canada (TUE) (Respondent) (*Dismissed*)

0432-90-U, 0433-90-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 673 (Applicants) v. Bourque Consumer Electronics Service Inc. and Mr. Pierre Bourque (Respondents) (*Dismissed*)

*Ontario Labour Relations Board,
400 University Avenue,
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ONTARIO LABOUR RELATIONS BOARD REPORTS

December 1990



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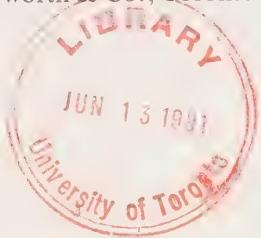
REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1990] OLRB REP. DECEMBER

EDITOR: PERCIVAL S.C. TOOP

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.



Typeset, Printed and Bound by Union Labour in Ontario



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2.	Boeing Canada/DeHavilland Division; Re Jill Bettes; Re C.A.W.....	1213
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SUDBURY YOUTH SERVICES INC.; RE O.P.S.E.U. 1339

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PLENNEVAUX, ANTOINE A.; RE L.I.U.N.A., LOCAL 1036 1314

Unfair Labour Practice - Duty of Fair Representation - Complainant's claim for disability benefits rejected by insurer because time limit for filing exceeded - Union not obliged under circumstances to protect complainant's rights by soliciting a grievance from her - Complaint dismissed

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0181-90-R Hotel Employees and Restaurant Employees Union, Local 604, A.F. of L., C.I.O., C.L.C., Applicant v. 599207 Ontario Inc., Respondent

Certification - Evidence - Membership Evidence - Practice and Procedure - Union business agent unable to recall whether he had reviewed information on Form 9 Declaration before signing and filing - Form 9 improper and unreliable under circumstances - Application dismissed

BEFORE: Robert Herman, Vice-Chair, and Board Members R. M. Sloan and K. Davies.

APPEARANCES: Harry A. Lavoie, Gerald (Gerry) Ellis, Lynn Ronco and Wendy Little for the applicant; R. W. Kitchen and John Lepore for the respondent.

DECISION OF THE BOARD; December 3, 1990

1. There have been a number of earlier decisions issued in this application for certification. The only remaining matters are a number of allegations of non-pay (the employer filed allegations that certain individuals had not paid a dollar when they signed their applications for membership in the union), and a related inquiry into the adequacy of the Form 9 Declaration. The Board conducted a hearing into these matters, and after hearing the evidence and submissions of the parties, the Board orally dismissed the application, with reasons to follow. We now provide those reasons.

2. Form 9 is a document which must be filed in all applications for certification (other than those arising in the construction industry), and in this document an individual, on behalf of the applicant union, must be able to make certain declarations, and must disclose certain information where appropriate. It is often paragraph 3 of Form 9 which is the critical paragraph, as it was in the instant proceeding. Paragraph 3 of Form 9 reads as follows:

3. (Where the documentary evidence consists in part of receipts or other acknowledgments of the payment on account of dues or initiation fees.) On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgments of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgment of payment I submitted has personally paid in money the amount shown

thereon on his own behalf to the person whose name appears on his receipt or acknowledgment of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES:

3. The Board has commented on the importance and the impact of a proper Form 9 on numerous occasions. In *Pebra Peterborough Inc.* [1988] OLRB Rep. Jan. 76, the Board wrote as follows:

29. The focus of the Board's Form 9 concerns has been commented upon before. In *Kitchener News Company Limited*, [1980] OLRB Rep. Nov. 1656, the Board wrote as follows:

6. The knowledge which is required as a precondition to signing the Form [9] Declaration was outlined by the Board in *National Steel Car Corporation Limited*, [1966] OLRB Rep. Jan. 738 at paragraph 13:

It is readily apparent that a person completing Form 9 must be seized with some type of knowledge in order to satisfy the requirements of item 3 cited above. This knowledge may be personal knowledge (i.e.) knowledge gained by either acting as the actual collector or knowledge gained by being personally present and actually witnessing the transaction between the collector and the member wherein the membership card was signed and payment of money made by the member to the collector.

The other type of knowledge which is acceptable is that knowledge gained from inquiries made of the persons who actually acted as collectors, or the persons who made the necessary inquiries of the actual collectors.

The requirement that inquiries be made is obviously not an onerous one or one that imposes an undue burden on the applicant; however, the requirement is that *inquiries be made. In order that inquiries be meaningful it is obvious that they must be made after the event. Instruction given to collectors prior to the signing of members may be helpful or necessary in the carrying out of an organizing campaign, however, such instructions do not obviate the necessity of making the inquiries required for the proper completion of Form 9.* (See *Dominion Stores Limited* case, [1964] OLRB Rep. Dec. 447).

In the instant case, Mr. Storey, prior to completing Form 9 made inquiries of Mr. Cooke. However, Mr. Cooke had made no inquiries of Mr. Griffin and in turn Mr. Griffin had made no inquiries of other persons who had acted as collectors. It is readily apparent that the inquiries made by Mr. Storey were made of a person who had no direct knowledge of the collectors and the failure of Mr. Cooke and Mr. Griffin to make inquiries frustrated the purpose of Mr. Storey's inquiries. Where the officers of an applicant trade union have themselves frustrated the inquiries made by the person who completes Form 9 and by their failure to follow through with their own inquiries, render the inquiries made by such persons meaningless, we must find that Form 9 in such circumstances cannot serve the purpose for which it was intended and in such circumstances is a nullity. In arriving at this conclusion, the Board has noted with approval the *Valley Transportation Company Limited* case, [1963] OLRB Rep. Nov. 448, wherein the Board said at p. 452:

The Board must expect and insist that persons who file applications for membership cards and receipts and Form 9 as evidence of membership, take all necessary precautions and care to ensure that the information contained therein is true and accurate.

The Board is entitled to demand the highest standards of integrity, disclosure, and accuracy on the part of those who submit such evidence and where undisclosed inaccuracies of material facts are later brought to its attention, to take a strict view of them. [emphasis added]

7. The standard enunciated by the Board in *National Steel Car. supra*, has been consistently applied in other cases in which the same issue arose. It is a standard which is well known in the labour relations community, and the cases on point are legion (see for example: *Puretex Limited*, [1972] OLRB Rep. June 676 and cases cited therein; *Stanley Steel Company Limited*, [1972] OLRB Rep. Feb. 181; and *N. D. Supermarket Limited*, [1976] OLRB Rep. March 112; *Triad Triumph Limited*, [1976] OLRB Rep. March 115; *Country Village*, [1976] OLRB Rep. July 373; *The Alexandra Hotel Limited*, [1972] OLRB Rep. Nov. 963; and more recently *Trent Valley Lodge Limited*, [1980] OLRB Rep. June 926). The purpose of the Form [9] inquiry (and the 'second check' that it builds into the system) is equally clear. The Board must place total reliance on documentary evidence--written hearsay, often solicited by inexperienced laymen, yet not revealed to the employer or subject to cross-examination (see section [111] of the Act). On the basis of that evidence, a trade union may be certified as the employees' bargaining agent without recourse to a representation vote. Indeed, unless some specific irregularity is brought to the Board's attention, the Board will normally place total reliance on the Form [9] Declaration and will not undertake any formal inquiry concerning membership documents which appear to be regular on their face. In the present case, for example, the Form [9] problem would never have come to light had it not been for the disclosure of an irregularity which would not have been apparent on the face of either the Form [9] Declaration or the membership card itself. To avoid such problems, the Board has always held that the person signing the Form [9] must be meticulous and comply strictly with its requirements.

30. And in *Grand & Toy Limited*, [1986] OLRB Rep. Sept. 1223, the Board wrote as follows:

"13... In certification proceedings the Board places heavy reliance upon the membership evidence filed by the union. Because of the consequences of the reliance that the Board places on what is a form of hearsay evidence which is not disclosed to the employer and is not subject to cross-examination, the Board requires a high standard of integrity in the nature and quality of the membership evidence filed. It is for an applicant trade union to satisfy the Board that every membership card upon which it relies was signed by the employee on whose behalf it is tendered and that each employee has paid the initiation fee that accompanies it. It is for this purpose that the Board requires (pursuant to Rule 6) a Form 9 declaration concern-

ing membership documents to be filed in every application for certification.

14. The Form 9 declaration is so important that if one is not filed, the Board will give no weight to the union's membership evidence (see for example *Pietrangleo Masonry* [1981] OLRB Rep. Feb. 218). If a Form 9 is filed but it is subsequently revealed either that no inquiry was in fact made by the declarant, or that the declarant failed to indicate in it discrepancies in the membership evidence of which he was aware, the Board may dismiss the application on the basis that no weight can be given to the declaration (see *Bond Place Hotel* [1983] OLRB Rep. Feb. 202). Where there are irregularities or discrepancies noted in the Form 9, the Board's practice is to concern itself with the acceptability of only the cards to which these apply. In addition, where a party has information that the union or anyone on its behalf has either attempted to perpetrate a fraud on the Board with respect to the membership evidence, or have otherwise acted improperly, that party can make those allegations and again the appropriate enquiry can be conducted."

31. Paragraph 3 of Form 9 is the critical paragraph and it is important to understand what is does not require as well as what it does require. It requires that the declarant, in this case the applicant's President, be able to make certain declarations, based either on the declarant's personal knowledge or the inquiries that s/he has made. If the declarant signs the Form based on personal knowledge, then that knowledge must be sufficient to allow the declarant to make the declaration in paragraph 3. It must also be sufficient to ensure that the declarant is aware of any exceptions to the standard declaration. Alternatively, if inquiries are made of collectors and these inquiries form the basis upon which the declarant is possessed of the necessary knowledge, then the inquiries must be made prior to signing the Form and they must be reasonable. The declarant need not inquire with respect to every conceivable event or possibility, but s/he must have made reasonable attempts and reasonable inquiries. What is reasonable will depend on the circumstances and context, but it is clear that an inquiry must be made, whether in a question and answer or a less structured format. Paragraph 3 demands that the declarant attest "*that the persons whose names on the receipts or other acknowledgements of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgement of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgement of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES:*". As the declarant warrants that the persons named as collectors were those who actually collected the moneys, and that each member for whom there is a receipt had personally paid the money to the named collector, the declarant will not possess sufficient knowledge if s/he merely looks at documents, and (for example) compares each card with a receipt. The declarant must also know personally of the circumstances of the collection or make inquiries about them.

32. The membership cards submitted by the applicant in the instant proceeding do not on their face unambiguously state the date on which the dollars were paid. In this respect the cards disclose the date on which someone attests that the money was paid, but not necessarily the date on which the money was *actually paid*. Paragraph 3 of Form 9 does not require on its wording that the declarant indicate if the monies paid on behalf of members were paid other than on the date the applicant signed the membership. There is nothing in the wording of paragraph 3 which demanded that McLean disclose that dollars paid for the membership cards used in the first proceeding were applied in some instances for the membership cards in the instant proceeding. To the contrary, only four matters appear to be required in order for a declarant to properly sign the Form 9. First, the basis of the declarant's knowledge must be personal experience or reasonable inquiries that the declarant has made. Second, the declarant must be able to declare that the collector named on the membership card actually received the payment of money from the member who signed the card. Third, where exceptions exist to the declaration with respect to the second aspect, the declarant must note those exceptions in the particular instance. "EXCEPT IN THE FOLLOWING INSTANCES:" requires an itemized listing of exceptions. Fourth, and of critical importance given the purpose of Form 9 and the Board's reliance on the integrity of the declarant and therefore of the hearsay membership cards, the declaration must not contain any statements that the declarant knew or ought to have known were material misrepresentations.

• • •

39. As well as the specific disclosures not made, we are concerned with the knowledge McLean had when he signed the amended Form 9. McLean was not present and did not have personal knowledge of the circumstances of the collection of all cards. With respect to the requisite inquiries, we cannot accept that the conversation in counsel's office with the collectors amounted to "reasonable inquiries". As noted, Hamilton, one of the collectors, testified that she never discussed the Form 9 with McLean. The other collector, Rutherford, gave all her cards to Hamilton who in turn gave them to McLean, but she testified that McLean never asked her anything about her cards and neither did Hamilton. Rutherford further testified that McLean never examined the receipts himself. Both collectors deny, therefore, that McLean inquired of them. These circumstances alone would cause us to reject the Form 9.

40. The Form 9 also materially misrepresents what occurred, and McLean knew or ought to have known this. Paragraph 2 of Schedule "A" states that "the two collectors were present together when all payments were received." The evidence of the collectors disclosed that both collectors were not always present when one or the other of them signed up new members and received dollar payments for those new cards (see paragraph 21 *supra*). Paragraph 4 of Schedule "A" declares that "the two collectors were present together when all combined membership cards/receipt forms were signed by them indicating receipt of the funds." But they were not always present together when new cards were signed, dollars received, and the receipt portion of the

membership cards signed (which the evidence indicated was all done at the same time for new members), and paragraph 4 must therefore be false also. Given the circumstances under which the cards and dollars were collected, these two inaccuracies are both material. Any reasonable inquiries of the collectors would have or should have disclosed these facts.

41. In the result, we are satisfied that proper inquiries were not made, that the first Form 9 before us is incorrect, and that two of the statements on the amended Form 9 are false and the declarant ought to have known they were false. We therefore reject the Form 9's as improper and unreliable.

42. Having rejected the Form 9's on the basis noted above, there is no membership evidence before the Board in this application to which the Board is prepared to give any weight and accordingly the application must be dismissed. As the Board noted above in the excerpts from *Kitchener News Company Limited*, and *Grand and Toy Limited*, a Form 9 Declaration is critical to the integrity and fairness of the certification process. Where the Board is asked to certify trade unions on the basis of hearsay membership evidence, without disclosing to the employer such evidence or allowing cross-examination on it, a high standard of integrity and reliability must be maintained. Both the hearsay nature of the membership evidence and the employer's inability to examine this evidence demand safeguards to insure its reliability. One safeguard is the Board's comparison of the signatures of applicants for membership with the specimen signatures provided by the employer for each such applicant. Another safeguard, both authorized and demanded by the regulations and the requirement that Form 9 be filed (see Rule 6 of the Rules of Procedure, Regulation 546 under the Act), is that someone *other than the individual applicant* attest in writing, by signing and filing a proper Form 9, that the applicant has in fact applied for membership and that the collectors have received the application funds on behalf of the trade union.

43. As the Board noted in *Grand and Toy Limited, supra*, and in numerous other cases, the Form 9 Declaration is considered so important by the Board that if one is not filed, the Board will give no weight to the union's membership evidence and the application will be dismissed. Consistent with this principle, if a Form 9 Declaration is filed but the Board determines that it is not a proper Form 9 Declaration, then the Board will also give no weight to the union's membership evidence and will reject the application. For membership evidence to be acceptable, it must not only contain the requisite elements and be filed by the terminal date, but must be supported by a proper Form 9. A Form 9 will be improper when the Board concludes that the declarant either did not possess the requisite personal knowledge to sign the form, or did not engage in the necessary reasonable inquiries as a prerequisite to signing the form. The Form 9 will also be improper if the declarant knew, or ought to have known, either that certain matters ought to have been disclosed, but were not, or that some of the disclosures constitute material misrepresentations. At the same time, there may be circumstances where the Form 9 is subsequently determined to be inaccurate, but nevertheless remains proper; for example, the Board is satisfied that the declarant made reasonable inquiries but those inquiries did not disclose exceptions or prob-

lems with the membership evidence and accordingly the declaration does not note such exceptions. In this latter circumstance, the declaration itself would be proper (though inaccurate) in that the declarant made the necessary inquiries and disclosed what the declarant knew or ought to have known. Any misinformation or lack of information provided by the person of whom inquiries were made in such a circumstance would not reflect upon the sufficiency or propriety of the Form 9 itself, and accordingly *viva voce* evidence might well satisfy the Board that the membership evidence in question is reliable. Again, such *viva voce* evidence is only admissible in certain circumstances: see paragraph 28, *supra*. But where no Form 9 is filed, or having been filed is found not to be proper in the sense that inquiries were not made, or exceptions or matters that should have been noted are not noted or inaccurately noted, the membership evidence will not be properly attested to as required by the regulations, and the membership evidence will be given no weight.

44. Quite apart from the fact that Rule 6 requires such a Form 9 to be filed, fairness to the parties and the integrity of the process demands such a Board response when a proper Form 9 is not filed. It is not a question of punishing the transgressing party, but of ensuring that both the Board and the parties have confidence in the integrity and fairness of the system and the certification process. Any such confidence would be seriously undermined if the Board were to conclude that a Form 9 was improper in one of the respects noted above, but nevertheless were to rely upon the *viva voce* evidence to find that the membership evidence was adequate and reliable. Were the Board to do so, there would be little incentive for Form 9 declarants to file proper Form 9's or make the necessary inquiries, since at worst an intentionally misleading or negligently inaccurate Form 9 would lead to the Board conducting its own inquiry, and at best, the Board might never discover the problems with the membership evidence. The requirement under the Rules that a Form 9 be filed, and the Board's insistence that it be a proper Form 9, provides the necessary deterrent to such potential abuse.

4. With these comments in mind, and the approach that the Board takes to the Form 9 Declaration, we turn to the facts. The Form 9 declarant was Gerry Ellis, the secretary/treasurer and business agent of the applicant. No exceptions are disclosed in paragraph 3 of the Form 9 which Mr. Ellis signed on April 30, 1990. Mr. Ellis was summonsed by the Board and gave evidence.

5. The membership cards (or applications for membership) which were filed in support of the application were either collected by Mr. Ellis himself, or turned over to Mr. Ellis, along with a dollar for each, by Lynn Ronco, an employee in the bargaining unit. Ms. Ronco was named as the collector on all the cards she provided to Mr. Ellis. Mr. Ellis testified that he did not discuss with Ms. Ronco, at any time after the cards were collected, whether she had received a dollar from the individuals whose cards she collected. Instead, Mr. Ellis asked her to write out the relevant information on a document he had prepared, which listed the name of each employee who had signed an application for membership. Ms. Ronco was to write in, under the name of each employee for whom she was turning in a membership application and dollar, the location and date on which that employee's signature had been obtained, who had been responsible for collecting the signature, and whether the dollar had been received from that employee. Ms. Ronco filled out the requested information and returned the document to Mr. Ellis. Mr. Ellis candidly testified he was unable to

recall when he had received this document and he could not recall whether he had reviewed the information in it prior to signing and filing the Form 9 Declaration. The information provided in the document by Ms. Ronco disclosed that, for two of the membership applications, she had not been the collector who had obtained the signatures of the employees or collected the dollar. The name of the actual collector for those two cards was also disclosed in the document. As noted, those cards showed Ms. Ronco as the collector. And as noted, Mr. Ellis did not disclose any exceptions in the appropriate space in paragraph 3 of Form 9.

6. We need not decide if Mr. Ellis reviewed the information provided in the document by Ms. Ronco prior to signing and filing the Form 9 Declaration. In either event, the Form 9 Declaration was improper. If Mr. Ellis did not review that information before he signed and filed the Form 9 Declaration, then he could not have made the reasonable inquiries required of a person before s/he signs the Form 9 Declaration. Mr. Ellis would have been aware of the necessary information with respect to the cards that he had been responsible for collecting. Through personal knowledge, as the collector, he would have known that the employees had each paid a dollar and that the dollar had been paid to the person named on the card as collector. But he could only know about the cards and dollars collected by Ms. Ronco or the other collector through reasonable inquiries. He testified he made no inquiries of Ms. Ronco, after the cards were collected. He asked only that she fill out the required information on the document he gave her. If he did not review that information prior to his signing and filing the Form 9 Declaration, he would have made no inquiries whatsoever with respect to those cards, let alone reasonable inquiries. Mr. Ellis would not have been in a position to have properly signed the Form 9 and could not properly have made the declarations contained therein.

7. Alternatively, if Mr. Ellis did review the information provided by Ms. Ronco in the document prior to signing and filing the Form 9 Declaration, then he knew, or ought to have known, that two of the cards that showed Ms. Ronco as collector had been collected by another employee. The statement in paragraph 3 of Form 9 is a declaration by Mr. Ellis that the persons whose names appear "on the receipts or other acknowledgments of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid". This part of the declaration is clearly not true for two of the membership cards. That someone other than the person shown on the card as collector actually collected that card is a material fact, and must be disclosed. Yet Mr. Ellis signed the Declaration without noting this information. The Form 9 therefore misrepresented facts in a material respect, and Mr. Ellis would have or ought to have known this if he had read the information provided by Ms. Ronco.

8. In either event, whether the information provided by Ms. Ronco was read by Mr. Ellis before or after he signed and filed the Form 9, the Form 9 was improper. If Mr. Ellis had read the information beforehand, the Form 9 was improper because it would have materially misrepresented what had occurred. If he did not first review the information, the Form 9 was improper because no inquiries would have been made by Mr. Ellis with respect to some of the cards. In either event, the Form 9 filed was improper in a material respect. The Board therefore rejected the Form 9 as improper and unreliable.

9. Having rejected the Form 9, for reasons similar to those expressed by the Board in *Pebra Peterborough Inc. (supra)*, at paragraphs 42 to 44 therein, there was no membership evidence to which the Board was prepared to give any weight. For these reasons, the application was dismissed.

10. Given our ruling with respect to the inadequacy of the Form 9, we need not rule upon any of the other allegations with respect to the membership evidence.

1761-88-OH; 1563-89-U Jill Bettes, Complainant v. Boeing Canada/DeHavilland Division, Respondent; National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada) and Jill Bettes, Complainants v. Boeing Canada/DeHavilland Division, Respondent

Health and Safety - Employee citing second tobacco smoke in work refusal - Health and safety not real reason for refusal - Employer discipline not improper under circumstances

BEFORE: S. A. Tacon, Vice-Chair, and Board Members J. A. Ronson and D. A. Patterson.

APPEARANCES: Daniel A. Harris, Gus Goncalves and J. Bettes for the complainants; L. Bertuzzi, H. A. Dyer and P. Irwin for the respondent.

DECISION OF THE BOARD; December 20, 1990

1. Board File 1761-88-OH is a complaint pursuant to the *Occupational Health and Safety Act* (OHSA) in which the complainant alleges that she has been disciplined for exercising her right to refuse to work under the OHSA. Further, she alleges that various other actions on the part of the respondent company or specified individuals also constitute reprisals for exercising her rights under the OHSA.

2. During the proceedings, a complaint was filed with the Board (Board File 1563-89-U) alleging violation of section 80(1) of the *Labour Relations Act* (the Act). As noted below, J. Repace was a witness in Board File 1761-88-OH; the section 80(1) complaint impugned certain alleged conduct by the respondent ostensibly in connection with the fact that Repace testified on behalf of the complainant. Counsel were afforded full opportunity to address the substance of the section 80(1) complaint, as pleaded, as well as the appropriate procedure for considering that complaint in connection with the OHSA complaint. The Board ruled orally as follows:

The Board has considered the submissions of counsel with respect to the section 89 complaint just filed. In the Board's view, an allegation that section 80 of the Act has been violated is very serious. However, also in the Board's view, the allegations as pleaded do not disclose a *prima facie* case of breach of section 80.

3. The Board heard testimony from 16 witnesses. As well, extensive documentary evidence was filed. The proceedings involved many days of hearing. Credibility was a critical issue and will be considered in some detail below.

4. It is appropriate to deal with several matters at this juncture. During the hearing, the Board made a number of rulings with respect to the admissibility of documentary material and in response to objections to questions which one or other counsel sought to ask a witness. At the conclusion of the hearing, counsel for the complainant requested that the Board issue its reasons, given orally in respect to several rulings, in written form. The Board has considered that request but, except as noted in paragraph 2, does not regard it as necessary or usual practice for the Board to reproduce such oral rulings in written form in its final decision.

5. As noted, J. Repace was a witness in the OHSA complaint called on behalf of the complainant. Repace was agreed by counsel to be an expert witness in the area of environmental tobacco smoke. A number of his articles were filed in evidence. Further, Repace testified with respect to various calculations he made grounding his conclusion that the complainant's work environment presented a danger from secondhand smoke. The Board has some additional comments

infra with respect to the issues to be determined by the Board in the instant complaint. At this point, however, the Board makes the following observations about the mathematical analysis of Repace. The data on which the analysis was based, that is, the information given to Repace, proved inaccurate in several respects. To give two examples, the assumptions as to the number of smokers and non-smokers in the procurement area and the dimensions of the room - both critical to the mathematical calculations - were incorrect. Further, the analysis was derivative, that is, based on figures generated through measurement of the capacity of the variable air volume (VAV) system at artificially induced settings rather than the measurement of the system in normal operation. Repace acknowledged he was not an expert in ventilation engineering and was unfamiliar with the VAV system in question. His assumptions with respect to the system's operation under specific conditions contradicted other testimony (that of V. Krebs) which the Board prefers. Moreover, Repace concluded that he had erroneously double-counted the expected level of background particulate matter in his equation. [Counsel for the respondent argued Repace committed another double-counting error as well but the Board need not deal with that argument.] For these reasons, and the Board's conclusion that the issues addressed by Repace's evidence are not those to be determined by the Board (see paragraph 70, 71 *infra*), the Board regards that evidence as of little assistance.

6. It is useful to sketch the main characters and witnesses involved. The respondent is the DeHavilland Division of Boeing. The "company" refers to DeHavilland; R. Woodard is President. The complainant, J. Bettes, is a long-service employee working in the procurement office at the time of the instant events. V. Torrance is a friend and fellow employee in that department. Besides Bettes and Torrance, the other employees in procurement initially involved with the work refusal were: F. Sharpe, B. Bain, R. McKenzie, J. Solosky and A. Tinianov. Bettes' first line supervisor during part of the relevant period was S. Munroe. Her next level of supervision was P. Maxwell (purchasing manager); B. Aarons is another purchasing manager in procurement. Both (plus others) report to G. Maybay, the director of procurement, who in turn reports to B. Applegate, vice-president of procurement. In the human resources area, G. Rehding is director of human resources development and personnel reporting to G. Anderson, vice-president of human resources. W. Bordian is manager, labour relations. In health and safety, C. Hollister (supervisor) reports to B. Williams, manager. The office employees are represented by Local 673 and the plant by Local 112 of the Canadian Union of Auto Workers (referred to as the union or the CAW). G. Goncalves is health and safety representative for Local 673; F. Sharpe (one of the refusing employees) is the complainant's committee person. G. Botic is health and safety representative for Local 112; P. Falconi is that Local's benefits representative. Several Ministry of Labour (MOL) inspectors, technicians, or other personnel were involved at various points including J. Harkins, P. Dranitsaris and Dr. Frith.

7. As mentioned, credibility is critical to the determination of this complaint. The Board has assessed the credibility of the witnesses according to the usual factors. In reaching its findings of fact, the Board has weighed the testimony, including the relative credibility of the witnesses, in the context of the documentary material filed and what is reasonably probable in the circumstances. In the Board's view, C. Hollister was a highly credible witness whose testimony the Board accepts. In addition to her *viva voce* evidence, Hollister kept careful notes (which were before the Board) of the events in which she was involved. As well, Hollister has not been employed by the company since May 1988 and, therefore, is detached from the proceedings. W. Bordian is also regarded as a highly credible witness and his account of events is accepted by the Board. The Board notes, too, that G. Goncalves was a credible witness; indeed, his testimony differed only in minor areas from that of Hollister and Bordian. It is not necessary to deal separately with each witness given that the Board's factual findings reflect the assessment of their credibility in the context noted above. However, the credibility of the complainant and V. Torrance merits brief comment.

The complainant's memory was selective and much of her testimony was self-serving. In the Board's view, her perception was clouded by her convictions. Accordingly, her testimony is disregarded wherever it conflicts with that of others. These comments apply likewise to V. Torrence.

8. In the above context, then, the Board next outlines the relevant facts, for convenience, in chronological order for the most part. The Board has not attempted to recount all the events in minute detail.

FACTS

Wednesday, March 9, 1988

9. On Wednesday, March 9, the complainant told several of her co-workers that she intended to refuse to work under the OHSA because of second-hand smoke in the procurement office. She spoke to those individuals early that morning to gauge their reaction to her plan and enlist, at least, their moral support. The conditions in the office that morning were not unusual. The complainant testified that she just made up her mind to refuse that particular morning. It is likely that the recent passage of a no-smoking bylaw in the City of Toronto (not applicable to the company given its location in North York) served to give the issue an immediacy. Shortly after the shift commenced at 8:00 a.m., the complainant informed Maxwell, procurement manager, of her refusal. Within minutes of her entering his office, six other employees in the procurement department informed Maxwell of their refusal to work as well.

10. Hollister, health and safety supervisor, was contacted immediately and met with the seven refusing employees. All complained of symptoms such as headaches, sore throats, nausea and congestion which, in their view, was the result of exposure to second-hand smoke. The work refusal was based on their belief that secondhand smoke was injurious to their health.

11. The company policy on smoking at that time designated certain areas as non-smoking (e.g. restrooms, lobbies, meeting rooms, classrooms, office hallways and stairs, etc.) with a goal of a total smoke-free workplace to be achieved in stages. Each employee could designate his/her individual desk (or separate office) as smoke-free or not. Further, smoking was prohibited in two-thirds of the cafeteria.

12. The seven employees initially were directed to take whatever work they could to the cafeteria and await further notice. The complainant acknowledged that little work was actually accomplished and the employees discussed the events thus far amongst themselves. Although the cafeteria was not physically divided into smoking and non-smoking areas, the seven regarded this as a "safe" area.

13. Maybay (director of procurement) and Applegate (vice-president of procurement) were advised of the refusal in short order. Applegate instructed the refusing employees to gather in the procurement conference room (an enclosed no-smoking area). In his view, the conference room could be utilized as a work area given its proximity to the procurement office and computer terminals and the equipment in the room, such as tables and a telephone. In contrast, the cafeteria, located in a separate building, lacked the necessary equipment to carry out the job duties of the seven employees. Further, over the staggered lunch period of 11:30 a.m. to 1:00 p.m., the cafeteria would be crowded and work would be impossible. The employees refused to work in the conference room, however, on the ground that the conference room and the procurement office area were on the same ventilation system and, thus, the exposure to secondhand smoke would continue, notwithstanding that the conference room itself was no-smoking. As it was close to noon by this time, the seven went to lunch.

14. The seven met again in the conference room at approximately 12:30 p.m.. Present for the company were Applegate, Maybay, Maxwell, Hollister and B. Williams (health and safety manager). The health and safety representative for Local 673 (Goncalves) and for Local 112 (G. Botic) attended as did B. Mackie (Local 673 chairman). Several MOL officials were there as well; some were already on site at the time of the refusals conducting a yearly health and safety audit. An inspector asked the employees their reasons for refusing. The response was that the exposure to secondhand smoke was injurious to their health and, additionally, that the air circulation was poor and the ventilation system recirculated air contaminated by secondhand smoke. Several employees expressed their view that the current smoking policy was not being enforced, that smoking should be banned except for designated areas and that the smokers and non-smokers in the procurement office should be segregated. The MOL advised the seven that air sampling tests would be conducted to measure for several chemicals as there was no single index for detecting the presence of secondhand smoke. Further, the guidelines for the ventilation system would be checked to ensure that system was operating efficiently and other measurements (temperature, heat and humidity) would be taken. Dr. Frith of the MOL told the seven he would need a medical release from each so their respective medical histories could be reviewed with their family physicians and each employee was to submit a medical report from his/her physician with respect to their medical condition. Frith noted that even if the tests did not indicate a problem generally, an MOL order could still be issued if so warranted by an employee's specific health problems. Frith also met privately with each of the seven in the health centre, another enclosed no-smoking area.

15. While the refusing employees were meeting privately with Frith, a further meeting was held in the office of the president, R. Woodard. Those present included: Woodard himself, Applegate, Maybay, Williams, Hollister, P. Irwin (director, employee relations) and R. McCall (senior vice-president) for the company; Botic, Goncalves, Mackie for the union. The immediate work refusal was discussed as was the company's current smoking policy. Woodard stated he wanted to resolve the work refusal and asked for suggestions. Goncalves did suggest that the current policy be enforced and that the non-smoking employees in procurement be segregated from those who smoked. The company indicated its goal was a total smoking ban but wished to implement that gradually with company support for employees who wanted to quit smoking. Applegate confirmed that the current smoking policy would be clarified and enforced, an employee bulletin would be released on April 15, 1988 outlining the company's plan for employee participation in a "last pack" smoking cessation program wherein the company would pay eighty per cent of the fee involved. As well, the company would wait for the MOL report on air sampling and medical information, seek to accommodate the non-smokers and check that the ventilation system was operating properly.

16. At approximately 3:30 p.m., Goncalves, Botic, Mackie, Applegate, Maybay, Williams, Hollister, Irwin and the seven refusing employees met again. Applegate reviewed the company's long-term goal of becoming smoke-free and that a bulletin to that effect would be issued on April 15, 1988. Reference was made to the "last pack" program. He confirmed that the current policy would be clarified and enforced and that the ventilation system would be checked. He indicated the company was prepared to segregate the smokers and non-smokers. The seven employees were asked individually if each was prepared to try that interim accommodation. All but Sharpe and the complainant agreed on the basis that their refusal could continue if the company's proposals were not carried out. The meeting ended with Applegate's statement that those employees willing to try the office rearrangement were to meet the next day at 8:00 a.m. in the procurement conference room while the others should proceed to the health centre.

Thursday, March 10, 1988

17. The complainant met the other refusing employees outside the procurement conference

room at 8:00 a.m. the next day. She had not decided whether to attend the company meeting. In her words, she did not want to be "left out" of events. A. Lowrie (the health centre nurse) stated to the employees that those not wishing to participate in the desk rearrangement could accompany her to the health centre. The complainant responded angrily and refused to go to the health centre - a location for diseased people (in her view) and she was not sick. Apparently Lowrie's comment prompted the to join the meeting in the procurement conference room.

18. The seven employees met in the procurement conference room with the management team in procurement headed by Applegate. Also present were D. Cartwright (replacing Goncalves) and Hollister. Sharpe and the complainant asserted that being sent to the health centre the day before (to meet with Dr. Frith) was a "reprisal". Hollister responded that the health centre was a safe place for the employees as it was entirely non-smoking. As all the management personnel in procurement had not attended the previous day's meeting, Applegate reviewed the smoking policy, including the clarification that lighted cigarettes could not be carried between desks or offices. Management personnel were instructed that, effective immediately, they were to enforce the smoking policy. The April 15 bulletin, company assistance for smokers who wished to quit and a goal of a total ban by the year end or early 1989 were mentioned by Applegate. He stated that the company wished to accommodate the non-smokers by segregating them from the smokers and asked for the refusing employees' cooperation. There were several comments by employees. In particular, the complainant refused to participate in the rearrangement of the desks, announcing that this was a "trap" but declining to give any reasons for that characterization of the process. The possibility of a partition or physical barrier between the smokers and non-smokers was raised but the company did not agree to that proposal because of fire and safety regulations and ventilation problem which would be caused thereby. Employees were advised that the desk rearrangement might result in their working with different buyers; no concerns were expressed on this point.

19. The meeting ended with Applegate's query of the seven employees as to whether they were willing to work at their desks as presently located until the physical rearrangement of the office could be accomplished on the weekend. All but the complainant agreed and were also involved in the rearrangement process. The complainant initially refused to return to her desk as she was beside a heavy smoker (A. Reid). Applegate agreed to accommodate her and, immediately thereafter, Reid exchanged places with a non-smoker.

20. The balance of that day was without incident.

Friday, March 11, 1988

21. That morning, the complainant heard from other employees that Woodard, during a regular breakfast meeting with several employees, had made a disparaging remark about the seven refusing employees. The complainant telephoned Woodard directly to confront him. According to the complainant, Woodard apologized fully for his comment and told the complainant that, if she wished to refuse to work in the future, to discuss the matter directly with Applegate.

22. In the afternoon, the MOL conducted air sampling tests at various locations in the procurement office, including the complainant's desk. The locations were recommended by the refusing employees.

23. In the late afternoon, the complainant testified that Maxwell told her that her desk would be placed at the front of the office so that management could "keep an eye" on her. Maxwell denied this statement. The Board does not accept the complainant's testimony on this point. It is evident that the other refusing employees participated in the rearrangement of their desks to segregate smokers from non-smokers. As well, the precise rearrangement had to reflect, as far as pos-

sible, the need for working groups or teams to remain in close proximity. The complainant refused to participate in that process. The complainant's desk was placed in the first row of desks as far as possible from the smoking section of the procurement office and together with her group, which included another of the refusing employees. It is accurate to note that the first row was relatively close to the enclosed offices used by management and where smoking was permitted under the policy. The Board does not regard it as probable that management wished to keep watch on the complainant and yet would openly communicate such a decision to her. Moreover, such an alleged statement is not consistent with the process whereby the desks were rearranged.

24. The Board notes that a smoking policy update was issued on Friday reiterating the smoking policy and clarifying that employees may not walk between desks while smoking as those areas were considered aisles/hallways. The update went on to state that supervisors were expected to ensure that all employees complied with the current policy and that, in April, the company would announce a schedule for implementation of a smoke-free office environment. Company sponsored stop smoking classes for all interested employees would begin in April as well.

March 12-14, 1988

25. The physical rearrangement of the desks was carried out over the weekend. On Monday, March 14, two of the refusing employees (Tinianov and Torrance) had concerns over the placement of their desks and their request for a further change was accommodated without difficulty.

Tuesday, March 15, 1988

26. Tuesday was the complainant's first day at work since the previous Friday. Her desk, as noted, was in the first row. The complainant testified that Aarons, who occupied the nearest office, smoked throughout the day, invited others in to smoke as well, joked with those other persons about the work refusal and stood at the door of his office blowing smoke out at her. Aarons is not her supervisor, although he does supervise others in the procurement office. She testified that she tried to raise the issue of her desk location and Aarons' alleged behaviour with Applegate who was, in her view, "too busy to respond". She further stated in evidence that Applegate made a sarcastic comment about the freshness of the air. The Board does not accept this account and prefers the testimony of Aarons and Applegate who denied the allegations. On the previous Thursday, Applegate had immediately responded to the complainant's request that she would no longer sit beside Reid, a heavy smoker, notwithstanding the complainant's refusal to participate in the reorganization in the procurement office. Further, on the day before (Monday), Tinianov and Torrance had been moved again in response to their concerns. Applegate testified that he would have responded to the complainant's concerns if she had raised a problem on that day. The Board accepts this response as consistent with the company's efforts to resolve the work refusal and to accommodate the employees.

27. The complainant contacted Goncalves about these alleged events and called the MOL directly seeking advice as to whether this was a "reprisal".

Wednesday, March 16, 1988

28. At the start of her shift that morning, the complainant contacted Goncalves and informed him she was continuing her work refusal. Within a few minutes, Hollister joined them. It is useful to set out the following excerpt from Hollister's notes regarding the conversation which ensued.

Cathy: Jill, why are you refusing to work?
(Hollister)

Jill: The same reason as the last time.
(Bettes)

Cathy: Can you repeat the reason?

Jill: The smoke is injurious to my health. Bob Errons [sic] chain smokes all day in that office with the door open, and other people go in there and smoke, and it bothers me.

Cathy: Are people carrying a cigarette in their hand in the aisleway on the way to his office?

Jill: No, they smoke when they are inside his office. The door is always open and the smoke comes right in my face; but even if the door was closed, it wouldn't help because the smoke would still come out when he opens the door.

Cathy: Would you be willing to exchange desks with another person in the no smoking area - would this be acceptable?

Jill: No, it wouldn't be acceptable.

Cathy: Do you have any suggestions of an acceptable alternative?

Jill: No, nothing will be acceptable. I'm not returning to this area until the Ministry of Labour comes back with some results.

Cathy: Gus, do you have any suggestions as an alternative?

Gus: No, Jill is saying nothing is acceptable right now.
(Goncalves)

29. Hollister advised Maxwell and Maybay of the situation. Maybay and Hollister returned to speak with the complainant and Goncalves. Maybay asked the complainant to proceed to the health centre (a smoke-free environment, as noted earlier) but she refused. She was asked where she was prepared to wait, responded that the cafeteria was acceptable and was permitted to go there.

30. While in the cafeteria, the complainant and Goncalves met with J. Harkins (a MOL inspector) with respect to the alleged reprisals taken by the company against her. At one point, Maxwell approached them, indicating that the complainant was needed at another meeting. Harkins explained he was conducting a MOL investigation and Maxwell agreed to return once that discussion was completed in about fifteen minutes.

31. During this period, as well, a meeting was held to discuss the circumstances of the continued refusal. Anderson, Smith, Irwin and Bordian from the Human Resources/Labour Relations side and Maybay and Hollister attended. Hollister informed the others of the events that morning including the complainant's refusal to relocate her desk or to accept as a solution that Aarons' door could be kept closed. The consensus was that everything reasonable had been done to accommodate the complainant and discipline was now appropriate. A one day suspension, the first step of progressive discipline, was suggested but Bordian was to meet with the complainant to confirm her position and determine whether discipline should be imposed. The "reprisal" section of the OHSA was raised and regarded as inapplicable to the circumstances.

32. Hollister telephoned the MOL (D. Spina) to update him on the current situation. She learned for the first time of the reprisal allegations. As requested by Spina, Hollister located Har-

kins and relayed the message that he was to call the MOL. Hollister also confirmed with Spina that the company was free to speak with the complainant once Harkins had finished his discussion. Hollister informed Bordian, Applegate and Maybay of her conversation with Spina and that Harkins wished to speak with Maxwell as he (Maxwell) was implicated in the alleged reprisal.

33. At approximately 11:00 a.m., a meeting was held with Bordian, Maybay and Maxwell for the company and Sharpe, Goncalves and the complainant in attendance. Sharpe was the Local Union committeeperson in the complainant's area. Although the meeting, from the company's viewpoint was not in connection with health and safety, there was no objection to Goncalves' remaining. Bordian stated that the company had tried to accommodate the complainant. She confirmed she was refusing to work because of secondhand smoke and asserted the company had not lived up to its commitments given the week before. In the complainant's view (a view not shared by management, Sharpe or Goncalves), the company had agreed to erect a partition or physical barrier between the smokers and non-smokers in the procurement office. (Botic, as well, disagreed with the complainant on this point.) This issue was discussed briefly with Bordian reiterating the company's position that no such commitment had been given. Bordian reviewed the steps which had been taken to accommodate the complainant including the segregation of smokers and non-smokers, placing the complainant in the non-smoking section and clarifying and enforcing the smoking policy. He indicated that those steps had been acceptable to the six refusing employees and to the complainant the week before and asked if there was anything that would satisfy her. The complainant's response was that only a total ban on smoking would be acceptable. Bordian asked again if the complainant was refusing to work at all; she replied in the affirmative. At that point, Bordian stated that he had no alternative but to impose a suspension for the balance of that day and cautioned her that additional instances of that type of misconduct could result in further discipline up to and including discharge. The complainant seemed pleased by this development. Goncalves raised the reprisal section of the OHSA. Bordian responded that the company was not violating the OHSA as everything reasonable had been done to accommodate the complainant. Once more, the complainant was asked if anything would satisfy her and she confirmed that no accommodation could be made short of a total, immediate smoking ban.

34. Before clocking out, the complainant was given permission to meet with Goncalves and Harkins in the cafeteria.

Thursday, March 17, 1988

35. The next morning, Maybay and Maxwell asked the complainant if she was prepared to work. She replied in the negative. Shortly thereafter, Bordian, Maybay and Maxwell again met with the complainant, Sharpe and Goncalves. Bordian reiterated the company's position that it had done everything reasonable to accommodate the complainant. She was directly asked if there was anything the company could do to persuade her to return to work. The complainant replied that there was nothing at all the company could do to satisfy her. Bordian then imposed a three-day suspension and cautioned that further similar instances of misconduct could again result in disciplinary action up to and including discharge. Goncalves queried whether the company was aware of the OHSA provisions prohibiting reprisals. Bordian replied that the company had made all reasonable efforts to accommodate the complainant. At this point, the complainant asserted that no male employees had been suspended for refusing to work under the OHSA. Bordian indicated that no employees had been so suspended. The complainant charged that she was being discriminated on grounds of her gender. Bordian rejected that allegation.

36. The complainant was given permission to meet with the MOL inspectors in the cafeteria before she clocked out on her suspension. In addition to Harkins and J. Kehoe for the MOL, Gon-

calves, the complainant and Hollister were present. The following extract from Hollister's notes convey the content and tone of the meeting.

MOL Jill, what was your reason for refusing to work yesterday?
Inspector:

Jill: Well, I have to go to the fax machine, by typists and material control, and to get there I have to walk through a smoking area. On the way there, I have to walk by a woman's desk that has an insulting poster on it regarding smoking.

Cathy: What does the poster say?
(Hollister)

Jill: "Please hold your breath while I smoke".

On Monday I was off, and on Tuesday, when I came to work I was annoyed at the new location of my desk. I was right in front of a supervisor's office, so he can keep an eye on me - and he sits there and smokes all day. Also, people go in his office and smoke.

About 11:00 a.m. on Tuesday March 15, B. Applegate dropped by my desk and asked what I thought about my new location.

I don't like it. Bobby Errons [sic] sits in his office and smokes all day. The threat Peter Maxwell (Jill's supervisor) gave me on Friday (she claims he said they'd put her where they can keep an eye on her) came true.

Jill: I asked B. Applegate if we could talk about it, but he was too busy. I waited all day for him to come back, and he didn't.

When I came to work on Wednesday, I thought "the hell with it". I've had enough.

Cathy: Did you go to your direct supervisor and complain to him on Tuesday of your concern?

Jill: I didn't have to - they came to me. B. Applegate asked me how I liked the new set-up. It was around 11:00 a.m. on Tuesday March 15/88.

MOL Did you have a resolution in mind when you wanted to discuss the situation with Bill Inspector: Applegate?

Jill: No, that's his problem - he has to come up with the resolution.

The Ministry of Labour Inspector had asked me [Hollister] of the sequence of events for Jill's refusal on Wednesday March 16, 1988. I then relayed the same information as in my report of March 16, 1988.

The Ministry of Labour then asked Jill if she had anything to add.

Jill: No, what she (Cathy) said is right.

Cathy: I would like to make a comment. I understand Jill and Gus, that you both contacted the Acting Manager at the Ministry of Labour (Dom Spina) on Tuesday March 15, 1988 at 3:45 p.m., regarding a concern of reprisal. Since both you and the Ministry of Labour were aware of this concern, I would suggest in future, that you also inform Management. We can't help to resolve problems if we are not informed.

Jill: It's none of your damn business.

Cathy: You're entitled to your opinion Jill, and I just expressed mine.

MOL I'm going to call in the Hygienist for air sampling at Jill's new location.
Inspector:

Jill: I'm the only female that's ever been suspended for a work refusal in this company.

The meeting adjourned at approximately 10:45 a.m.

37. The complainant then left the company premises. It should be noted that the two suspensions were later issued in writing. That afternoon, air sampling for secondhand smoke was conducted at the complainant's desk. Aarons smoked during the testing. Goncalves was present for the union. Hollister also learned that, to date, no medical reports had been provided to Frith. In fact, only Tinianov submitted a medical report to the MOL prior to the June formal report by the MOL (see *infra*). It should also be mentioned that, the following day, Goncalves contacted B. Nickerson in the National Union office to review events to date.

Tuesday, March 22, 1988

38. A teleconference was arranged early on March 22. Generally, the test results take roughly six weeks to obtain. The MOL agreed to provide the data as soon as possible and the teleconference format was utilized. Present for the report results via the teleconference were five of the seven refusing employees (two were absent that day) and various union and company representatives. The results of the air sampling on Friday, March 11 and Tuesday, March 17 (at the complainant's desk only) showed all levels were well within acceptable guidelines. The refusing employees then raised several matters with the MOL technician including the efficacy of the tests performed. The MOL technician (Dranitsaris) responded that there was no single index to detect the presence of secondhand smoke and the usual method was to test for trace contaminants. If those trace contaminants were not detected, the presence of secondhand smoke was insignificant. The MOL technician expressed his view that the office air was good and better than most.

39. Following the teleconference, Maybay reviewed the various steps the company had taken to accommodate the refusing employees and asked if everyone was prepared to return to work. Goncalves asked if the MOL results were disputed; no one did so. The employees agreed to return to work pending the MOL written report. Maybay confirmed that the written report would be distributed through normal channels as soon as it was received.

40. The complainant, Goncalves, Sharpe, Mackie, Maxwell, Maybay and Hollister remained. The complainant stated that, in her opinion, she had never refused to perform her job but had refused to work under the OHSA. Further, she said that her refusal would continue until the MOL reported and, as this was done, she was prepared to return to work although she would continue with her reprisal allegations. Maybay stated that the company was pleased that the complainant decided to return to work and asked if anything further could be done for her. The complainant wished to have her desk moved to a mutually agreeable location. Maybay assured her this would be done without delay. The Board finds that this move was arranged the next day.

41. Another meeting with the MOL, the complainant, Sharpe, Goncalves and Hollister was held in the cafeteria that day. Harkins requested the complainant's statements (presumably regarding the alleged reprisals) and reiterated the need for the refusing employees to submit medical documentation to Frith to substantiate claims of medical problems arising from exposure to second-hand smoke.

Late March to late June, 1988

42. The complainant filed a grievance alleging improper refusal of overtime and that the refusal constituted yet another reprisal against her. During the spring, large amounts of overtime were worked. Under the collective agreement, overtime is voluntary. The practice of assigning the overtime was to offer the extra hours first to the person already dealing with the specific suppliers.

This resulted in considerable disparity in the overtime worked by the employees in procurement. In fact, four grievances were filed (including the complainant's) challenging the overtime assignments. The individual benefiting most from the practice in assigning overtime was Solosky, one of the seven refusing employees. The overtime grievances were resolved between the company and the union on the basis of an undertaking to achieve a more equitable system of assigning overtime. After a successful trial period, the grievances were withdrawn. The complainant denied knowledge of the other grievances or that the issue was of concern to the entire department. The Board does not regard it as probable that the complainant was unaware of the broad concern over this issue. Further, when faced with an overtime schedule which contradicted her assertion that she virtually never was offered (yet alone worked) overtime following the March work refusals, she responded by claiming that the lists were often falsified. There is no compelling evidence to ground such an assertion.

43. In accordance with its commitment given to the refusing employees, the company issued a bulletin dated April 15, 1988 declaring January 1, 1989 as the implementation date for its no smoking policy and announcing its financial support for employees wishing to quit smoking in a "last pack" program.

44. In June, the MOL presented its written report at a meeting with persons representing the company and the union and the seven refusing employees. The results of the air sampling taken March 16 showed the air in the procurement office was well within the applicable guidelines. (The results had already been communicated to employees in the teleconference call, see paragraph 38). The MOL found that the conditions were not likely to endanger six of the seven. The seventh, Tinianov, had submitted medical documentation. Because of his clinical condition, the company was directed to take all reasonable steps to insulate him from secondhand smoke.

45. Another meeting was held immediately thereafter with the complainant, the MOL and the company and union representatives. The complainant presented a brief note from her doctor at this point. The test results of the air sampling on March 17 at her desk were presented, although that data had likewise been communicated earlier. The results were well within acceptable guidelines and the MOL finding was that the conditions were not likely to endanger the complainant. The alleged reprisals were raised. The MOL indicated it would be contacting the persons involved.

46. Over the next few days, the complainant testified that Maxwell was constantly "staring and glaring" at her, presumably because his name was raised in connection with the alleged reprisals. Further, the complainant testified that, on one occasion, when she and several employees were looking at photographs at the conclusion of the lunch break, she was "singled out" by Maxwell and rudely told to return to work. Maxwell then purportedly pursued the matter in a meeting with her in his office. The Board finds that Maxwell and Aarons did speak briefly to several employees, including the complainant, reminding them that the break was over. Nothing more unusual than that transpired. Similar comments had been made to employees on occasion in the past. Maxwell did seek to explain to the complainant that employees were expected to be ready to resume work following a break.

47. Another incident involving the complainant incurred in roughly this time period. Goncalves and the complainant were to meet with an MOL inspector. The complainant's immediate supervisor, S. Munroe was not aware that Maxwell had cleared the complainant to leave the procurement office with Goncalves. She questioned their leaving and was informed they were to attend a meeting. The three returned to Munroe's desk where she completed a "pass". Shortly thereafter, Munroe again challenged the complainant's right to leave, asserting that sufficient notice had not been given for a union meeting. Goncalves protested that the complainant had been

cleared by Maxwell. He left to speak to Williams to clear up the matter while the complainant returned to her desk. Williams gave his approval. A few moments later, Goncalves returned, informed Munroe of Williams' clearance; the two left for their meeting. Williams spoke directly to Munroe about the matter. On the complainant's return to the procurement office, Munroe apologized indicating that she didn't realize the complainant had been cleared and was meeting with the MOL. The Board accepts the testimony of Goncalves that Munroe was visibly upset, particularly when she approached him and the complainant on the second occasion. Munroe had recently been promoted to the position of supervisor and was apparently confused as to the nature of the meeting and the process for clearance in those circumstances. It is also likely she viewed the situation as a challenge to her authority. However, she promptly apologized to the complainant when she (Munroe) learned of the prior clearance and the circumstances of the meeting and the matter ended there.

July 1988 to January 1989

48. The complainant reported to the health centre on September 27, 1988 complaining of difficulties with her vision. Lowrie, the nurse in charge at the time, suggested the complainant see her family physician. The complainant filed a claim with the Workers' Compensation Board (WCB) for disability due to illness at work. The basis of the claim was "sick building syndrome", primarily due to secondhand smoke. The company practice is generally to advance sickness and accident benefits upon signing of a waiver form by the employee until the WCB claim is adjudicated. The company receives the sickness and accident cheques from the insurance carrier, confirms the accuracy of the information (name, address, etc.) and releases the cheque for direct pick-up or for mailing. Because of the unusual nature of the claim (sick building syndrome), G. Rehding (benefits manager) wished to review the matter with his supervisor. Such reviews had occurred in the past on rare occasions. The cheque was received at some point on October 18. Rehding was informed of that the next day and told P. Falconi (Local 112 benefits representative and a friend of the complainant) that the claim was being reviewed. On October 20, Rehding spoke with Anderson. Rehding was advised by Anderson that normal procedures should be followed and the WCB would deal with the nature of the claim. The cheque was released and was picked up by Falconi, as per the complainant's request. It appears the complainant had the cheque in her possession on the 21st at the latest and the cheque was cashed the day after. Thus, the "delay" occasioned by Rehding's decision to seek advice was, perhaps, two days.

49. To complete the chronology, a few additional matters should be noted. A number of trailers had been used during 1988 for classrooms and offices because of an acute space shortage. Toward the end of the year, space became available in a trailer and the company determined it was feasible for the complainant to work there. That offer was made to the complainant, i.e., that she could work in a smoke-free environment. That offer was made in November; the complainant accepted and returned to work. In January, 1989, the company, as planned, went smoke-free in accordance with its policy. A bulletin to that effect was issued January 3, 1989. Earlier bulletins in October and November, 1988 reminded employees of the upcoming January 1 implementation date and of the company's financial support for employees wishing to quit smoking through the "last pack" program. In February, once the complainant obtained medical confirmation that she could work in the building, she returned to the procurement office. The complainant's WCB claim was denied, as was the first level appeal of that decision; a further appeal has been filed.

50. The submissions of counsel are next set out in highly abbreviated form. The Board notes that counsels' representations with respect to the factual findings each wished the Board to reach based on the evidence were submitted in written form.

51. Counsel for the respondent argued that the analysis could not be neatly pigeonholed but could be summarized in the assertion that the complainant either never acquired the protection of the OHSA or lost that protection because of her subsequent conduct. In either event, it was contended the company had not breached section 24 of the OHSA in imposing the one-day and the three-day suspensions. Counsel argued that the initial refusal on March 9 was not protected as the complainant did not act out of concern for her health or safety. Nevertheless, the company investigated the refusal albeit the first and second stages were blurred because of the presence of the MOL on site. Whether the refusal on March 16 was characterized as a continuation of the first refusal or a new refusal, it was asserted that the complainant again did not come within the ambit of the OHSA at least in persisting in her conduct following the company's response. Counsel argued the complainant's motives in acting as she did took her outside the Act and, further, her conduct following the refusal was relevant to assessing her motive and the reasonableness of her position. The evidence was reviewed briefly in support of these propositions. Counsel submitted that the company complied with section 23(10) in asking the complainant if there was anything they could do and anywhere she would work and that discipline imposed for failure to perform reasonable alternative work was not prohibited by the OHSA. With respect to Repace's testimony, counsel argued that Repace's evidence was of no assistance because of errors and mistaken assumptions in the analysis and because the complainant was unaware of Repace's articles at the time of the refusal. It was also argued that, in the circumstances, section 24(7) was inapplicable. Cases cited in support included: *The Corporation of the City of Ottawa*, [1986] OLRB Rep. June 798; *North American Plastics*, [1987] OLRB Rep. Feb. 251; *International Harvester*, [1983] OLRB Rep. June 898; *Toronto Transit Commission*, [1985] OLRB Rep. Feb. 344; *Camco Inc.*, [1985] OLRB Rep. Oct. 1431; *Dowty Equipment of Canada Ltd.*, [1983] OLRB Rep. Sept. 1451; *Sidbec Dosco Inc.*, [1988] OLRB Rep. Dec. 1334; *Bradley Air Services*, Canada Labour Relations Board, unreported, decision 743, May 18, 1989.

52. Counsel for the complainant asserted that secondhand smoke was a contemporary social problem yet the company did not take the refusal seriously. It was argued the complainant, as a matter of fact and law, had an honest belief and even a reasonable belief that exposure to secondhand smoke was dangerous. Counsel contended the company did not make a specific offer of alternative work and "set her up", for the discipline. Counsel also argued that, as the jurisprudence states that one can be wrong about a perceived danger and yet be reasonable, if one is correct about the danger, one must be reasonable to refuse and have the protection of the OHSA. As the company knew the grounds for the complainant's refusal, if the company was incorrect in assessing the reasonableness of her conduct, that error flowed through to render the company's imposition of discipline a breach of section 24. With respect to credibility, counsel argued that the Board could be selective in deciding what to accept from each witness, i.e., that credibility was not an "all or nothing" assessment. Counsel contended that the Board should be on the leading edge of health and safety and should note the change in public attitudes towards smoking. The Board, it was submitted, should not discourage work refusals and should give the worker the benefit of the doubt although counsel agreed there must be some element of *bona fides* in the worker's conduct. The cases cited by respondent's counsel were distinguished on the basis that those cases dealt with instances where the health and safety element was just a ruse whereas here the complainant had a health and safety concern. Finally, it was contended that the complaint turned on the characterization of the complainant's conduct with respect to the refusal rather than her "extraneous" conduct.

53. Counsel for the complainant referred to various statutes and regulations, some enacted subsequent to the events in question, for the purpose of indicating increasing governmental concern with the issue of smoking in the workplace. Several other cases were cited for their legal propositions only and not for their facts or colouring of the facts: *DeHavilland Aircraft of Canada Ltd.*, (1986), 25, L.A.C. (3d) 249 (Davis); *DeHavilland Aircraft of Canada Limited*, (unreported,

November 12, 1985) (Barton); *DeHavilland Aircraft of Canada Limited*, (unreported, October 14, 1986) (Palmer); *R. v. Graves and Harnon* (Provincial Court, Criminal Division, unreported, October 8, 1987). These cases deal with the same company and involve another employee in the procurement department. The Board had precluded complainant's counsel from leading evidence during the proceedings and for reasons given orally, as to these events. The Board has reviewed the cases and finds the legal analysis therein not relevant to the instant complaint. Other cases referred to in support of counsel's submissions included: *Wilson and Treasury Board* (P.S.S.R.B., unreported, Dec. 20, 1985); *The Queen in right of Canada as represented by the Treasury Board v. Wilson v. P.S.S.R.B.*, [1987] 1 F.C. 452 (leave to appeal to the S.C.C. denied April 9, 1987); *Canadian Gypsum Construction*, [1978] OLRB Rep. Oct. 897; *General Motors of Canada Limited*, [1980] OLRB Rep. May 700; *Dowty Equipment of Canada Ltd.*, supra; *Black & McDonald Ltd.*, [1983] OLRB Rep. Dec. 1971; *Art Shoppe*, [1988] OLRB Rep. Aug. 729; *Domtar Inc.*, [1988] OLRB Rep. Aug. 780; *Butler Metal Products*, [1988] OLRB Rep. Oct. 1003; *Sidbec Dosco Inc.*, supra; *Accuride Canada Inc.* (OHSA appeal under s. 32 to the Director of Appeals, April 14, 1989).

54. In reply, counsel for the respondent asserted that the submissions of complainant's counsel ignored the facts of the instant case. It was argued that Repace's evidence with respect to second hand smoke should be disregarded for the reasons given earlier. Beyond this, there was no evidence the complainant was "correct" about the dangers of secondhand smoke given the MOL finding that the situation was "not likely to endanger" the complainant. In this regard, counsel also noted the current legislation in Ontario did not entirely prohibit secondhand smoke in the workplace as designated smoking areas on the same ventilation system were permitted. Counsel disputed the assertion the company had not taken the refusals seriously. Further, it was argued that the reasons for the complainant's refusal on March 16, in fact, centered around her view of the company's conduct as "reprisals" (the health centre issue, the Aarons incident, the Woodard comment) rather than concern for health and safety. Counsel submitted the company satisfied its obligation to offer alternative work by asking what the complainant was prepared to do; the complainant lost whatever protection of the OHSA she may have had at that point through her conduct thereafter. That is, the right to refuse work does not become a right to be unreasonable.

DECISION

55. It is appropriate to first set out the sections from the OHSA relevant to this complaint:

23.-(3) A worker may refuse to work or do particular work where he has reason to believe that,

- (a) any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself or another worker.

(4) Upon refusing to work or do particular work, the worker shall promptly report the circumstances of his refusal to his employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of one of,

- (a) a committee member who represents workers, if any;
- (b) a health and safety representative, if any; or

- (c) a worker who because of his knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them,

who shall be made available and who shall attend without delay.

(5) Until the investigation is completed, the worker shall remain in a safe place near his work station.

(6) Where, following the investigation or any steps taken to deal with the circumstances that caused the worker to refuse to work or do particular work, the worker has reasonable grounds to believe that,

- (a) the equipment, machine, device or thing that was the cause of his refusal to work or do particular work continues to be likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works continues to be likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention continues to be likely to endanger himself or another worker,

the worker may refuse to work or do the particular work and the employer or the worker or a person on behalf of the employer or worker shall cause an inspector to be notified thereof.

(7) An inspector shall investigate the refusal to work in the presence of the employer or a person representing the employer, the worker, and if there is such, the person mentioned in clause (4)(a), (b) or (c).

(8) The inspector shall, following the investigation referred to in subsection (7), decide whether the machine, device, thing or the work place or part thereof is likely to endanger the worker or another person.

(9) The inspector shall give his decision, in writing, as soon as is practicable, to the employer, the worker, and, if there is such, the person mentioned in clause (4)(a), (b) or (c).

(10) Pending the investigation and decision of the inspector, the worker shall remain at a safe place near his work station during his normal working hours unless the employer, subject to the provisions of a collective agreement, if any,

- (a) assigns the worker reasonable alternative work during such hours; or
- (b) subject to section 24, where an assignment of reasonable alternative work is not practicable, gives other directions to the worker.

(11) Pending the investigation and decision of the inspector, no worker shall be assigned to use or operate the equipment, machine, device or thing or to work in the work place or the part thereof which is being investigated unless the worker to be so assigned has been advised of the refusal by another worker and the reason therefor.

(12) The time spent by a person mentioned in clause (4)(a), (b) or (c) in carrying out his duties under subsections (4) and (7), shall be deemed to be work time for which the person shall be paid by his employer at his regular or premium rate as may be proper.

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;

- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 89 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications, as if such section, except subsection (5), is enacted in and forms part of this Act.

(4) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), sections 102, 103, 106, 108 and 109 of the *Labour Relations Act* apply, with all necessary modifications.

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

(6) The Ontario Labour Relations Board shall exercise jurisdiction under this section on a complaint by a Crown employee that the Crown has contravened subsection (1).

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

56. It is also useful to summarize the various alleged acts which the complainant asserts constitute "reprisals" contrary to section 24 of the OHSA. This itemization is derived from the pleadings and the testimony of the complainant. The alleged misconduct includes, in chronological order: (1) being sent to the health centre on Wednesday, March 9, together with the six other refusing employees, to meet with Dr. Frith of the MOL; (2) the statement by Lowrie on Thursday morning, that persons not willing to participate in the meeting at 8:00 a.m. that day in the procurement conference room should go to the health centre (Applegate had made a similar statement the day before); (3) the disparaging remark by Woodard about the refusing employees at a breakfast meeting with several employees on March 10; (4) the statement by Maxwell on Friday, March 11 that management intended to "keep an eye" on the complainant and move her desk to the front row; (5) the actual location of her desk in the first row of the non-smoking section on Tuesday, March 15 (the first day the complainant was at work following the desk rearrangement); (6) the behaviour of Aarons on March 15 in blowing smoke out his office door directly at the complainant, inviting others to smoke in his office and joking about the initial work refusal; (7) the rudeness of Maxwell in interrupting a meeting in the cafeteria with the complainant, Goncalves and Harkins for the MOL on Wednesday, March 16; (8) the one-day suspension imposed on Wednesday, March 16; (9) the three-day suspension imposed on Thursday, March 17; (10) the glaring and staring at the complainant by Maxwell on June 8 and for a few days thereafter following a meeting with the MOL attended by various company and union representatives including Maxwell and at

which Maxwell's name was raised in connection with alleged reprisals; (11) the singling out of the complainant for reprimand for not being at her desk ready to work following lunch on one occasion; (12) the denial of overtime to the complainant following her work refusal; (13) the interference by Munroe in the complainant's attendance at an MOL meeting in late June; (14) the delay in issuing sickness and accident benefits by Rehding in October. In reciting this litany of alleged reprisals, the Board has merely set out the complainant's view of the events. As noted in its factual findings, the Board does not agree with the complainant's account of these incidents, quite apart from the Board's legal conclusions with respect to the question of the contravention of section 24 of the OHSA.

57. The Board intends to consider first the alleged reprisals other than the two suspensions. In that regard, the Board need not repeat at length its factual findings given earlier.

58. The Board does not regard the references to the health centre as a meeting place for the interviews with Dr. Frith or the location for those refusing employees who did not wish to participate in the desk reorganization as a "reprisal". That location was enclosed and entirely non-smoking. The assertion that the health centre was for "sick people" and the complainant (and the other employees) were not "sick" is somewhat difficult to comprehend since the claim was that exposure to secondhand smoke was, in fact, making the employees "sick" and their symptomatology was described. The allegation that this conduct constituted a reprisal is rejected.

59. It is likewise difficult to understand how the disparaging remark made by Woodard is a reprisal within the meaning of section 24 of the OHSA. Further, Woodard directly apologized to the complainant for his comment. This allegation, too, is dismissed.

60. As the Board does not accept, as a factual matter, that Maxwell made the statement asserted with respect to "keeping any eye" on the complainant, the Board need not deal further with this alleged reprisal. The Board dismisses the allegation regarding Aarons' ostensible behaviour on March 15 and Maxwell's ostensible behaviour in the cafeteria on March 16 on the same basis.

61. With respect to the assertion that the location of the complainant's desk in the front row following the desk rearrangement, the Board finds that this, too, does not constitute a reprisal under section 24. Far from being a reprisal, the Board finds that the company placed the complainant as far as possible from the smoking section of the procurement office together with the other members of her team which included another employee who participated in the initial work refusal. Moreover, the complainant had expressly refused to participate in the desk reorganization and, thus, the company's decision as to location was made without her input.

62. As to Maxwell's alleged "glaring and staring" in June and the purported singling out of the complainant for not being ready to work following a lunch break, the Board has rejected the complainant's version of events in reaching its factual findings. On the evidence accepted by the Board, these "incidents" (to the extent they occurred at all) are not contraventions of section 24 of the OHSA.

63. The Board expressly finds that the complainant was not denied overtime opportunities in the period following her work refusals because of her refusals. Rather, overtime was distributed in accordance with the company practice which resulted in a disproportionate amount of overtime being worked by one employee (Solosky). It should be stressed that Solosky was one of the employees involved in the initial refusal. Moreover, four grievances were filed, including the complainant's, regarding the practice of assigning overtime then in use and the problem of overtime distribution was resolved between the company and the union. This alleged reprisal fails as well.

64. The complainant characterized the Munroe incident as a reprisal. It is difficult to fathom in what way the incident could be so construed. Even accepting (as the Board does) that Munroe was upset at what she, at the time, perceived to be a violation of the process for obtaining permission to leave a department, the "interference" amounted to no more than a brief delay in the complainant's departure for her meeting with the MOL. Further, Williams (the health and safety manager) both granted permission without delay to Goncalves for the complainant to leave the procurement department but also spoke to Munroe about the situation. Finally, Munroe apologized to the complainant immediately upon her (the complainant's) return to the area. The Board finds no contravention of section 24 therein.

65. As to the delay of at most two days in releasing the complainant's sickness and accident cheque, the Board has concluded that Rehding's concern about the novelty of the claim and his decision to consult his superior were not unreasonable and certainly not a reprisal for the complainant's work refusal some eight months earlier. It should be noted that Rehding's superior directed him (Rehding) to follow normal procedures and release the cheque.

66. In short, the Board dismisses those allegations. Clearly, the complainant was prepared to characterize any disagreement with her views or incident in the months following the March work refusals as a reprisal. While it is conceivable that an employer might engage in a pattern of conduct which, taken together, was tantamount to a "penalty" or "intimidation" or "coercion" in contravention of section 24 of the OHSA, that is not this case.

67. The question of the two suspensions, however, is more problematic and requires a brief review of the relevant jurisprudence before beginning the analysis of the instant case.

68. The following passage from *Domtar Inc.*, *supra*, summarizes the Board's approach to the OHSA structure for dealing with work refusals and the statutory right to refuse unsafe work:

29. In *Inco Metal Co.*, [1980] OLRB Rep. July 981, the Board in considering the predecessor to these sections said that it "must interpret and apply the Act bearing in mind the shortcomings of the pre-existing law that it was designed to remedy". After reviewing those shortcomings at some length, together with the social and human toll taken by industrial accidents and their adverse impact on the economy, the Board concluded that the predecessor provisions "must be given a liberal and constructive interpretation that is consistent with the intent of the legislation".

30. Similarly, the Board observed in *The Corporation of the City of Toronto*, [1986] OLRB Rep. Dec. 1834:

We also agree that the Board should not put an unduly rigid construction on the terms of section 23(1), lest employees be discouraged from raising safety issues at the work place. That would be inconsistent with the scheme of the Act. Section 23 is designed to promote and protect employee prudence, while at the same time, providing a mechanism for resolving legitimate concerns through a process of discussion with the employer, and, if necessary, the assistance of a "neutral" official of the Ministry of Labour. It is both proper and desirable that employees should be able to voice their safety concerns without fear of penalty or reprisals...

The Board has commented that initially an employee may refuse work which he or she has reason to believe is unsafe, a test which is subjective in its nature (see, for example, *The Corporation of the City of Ottawa*, [1986] OLRB Rep. June 798). Where there is such a refusal, the employer is required to investigate the matter forthwith in the manner set out in section 23. Following that investigation or steps taken to deal with the circumstances that prompted the work refusal, the worker may continue to refuse if he or she has reasonable grounds to believe that the work is unsafe. The Board has concluded that this subsequent test is an objective one, and

has adopted this enunciation of the test set out in *Inco Metals*, supra, with respect to the predecessor legislation (see for example, *Camco Inc.*, [1985] OLRB Rep. Oct. 1431):

59. On a complaint such as this, therefore, in considering whether an employee had reasonable cause to refuse to work in a given situation, this Board must ask itself whether the average employee at the work place, having regard to his general training and experience, would, exercising normal and honest judgement, have reason to believe that the circumstances presented an unacceptable degree of hazard to himself or to another employee.

Where the worker continues to refuse, an inspector is required to investigate the refusal in the presence of the employer, the worker and an employee representative after which the inspector gives his or her decision in writing to the parties.

31. The Board has held that the reasonableness of an employee's belief may be affected by an inspector's decision. (*Auto Jobbers Warehouse Ltd.*, [1981] OLRB Rep. Dec. 1715.) In this regard, the Board has noted that an employee is entitled to continue to refuse to work even after an inspector's report declares the workplace to be safe as long as he continues to have reasonable grounds to do so. However, a worker who refuses to work where there has been an investigation and a decision by a neutral expert that the work is safe faces an increasing onus with respect to the reasonableness of his or her position (see *Canadian Gypsum Construction*, [1978] OLRB Rep. Oct. 897). That onus is still subject to the general burden of proof that the employer bears under section 24 (see *The Corporation of the City of Toronto*, supra).

32. At no stage must an employee be proven correct with respect to the safety of the work. Rather, in *Inco*, supra, the Board said that it will look at the reasonableness of the employees' views in light of the information available to the worker at the time of the refusal:

The ability of an employee to invoke the right to refuse work does not depend on whether there is in fact any danger. The question is whether at the time an employee refuses to perform his work he has reasonable cause to believe that it is unsafe to do so. The fact that it may later be shown that there was no real danger at the time an employee refused to work doesn't mean that the employee was wrong in exercising his right under the Act. The events must be assessed in the light of knowledge available at the time that the employee refused to work...

See also *Imperial Oil Ltd.*, [1982] OLRB Rep. Apr. 580, and *Wilco Canada Inc.*, [1983] OLRB Rep. Oct. 1759 in this regard.

69. Section 24 of the OHSA prohibits an employer from imposing discipline or otherwise penalizing, coercing or intimidating a worker because that worker has acted in compliance with the OHSA or has sought the enforcement of the OHSA: *Domtar Inc.*, supra; *Art Shoppe*, supra; *Canadian Gypsum*, supra; *Black & McDonald Ltd.*, supra; *Butler Metal Products*, supra. The protection of the OHSA is afforded employees who satisfy first the subjective test and thereafter an objective standard. As stated in *International Harvester*, supra, if the employer accurately assesses the worker's beliefs as unreasonable, the full range of disciplinary penalties is available (see also: *The Corporation of the City of Ottawa*, supra; *Camco Inc.*, supra; *Toronto Transit Commission*, supra.) Moreover, where a worker has claimed the protection of the OHSA but that claim is found to be spurious, cloaking the worker's actual motivation, the employer may impose discipline for conduct which is otherwise improper: *Continuous Colour Coat*, supra and the cases cited therein; *Bradley Air Services*, supra. The protection in section 24 against reprisals cannot be construed as a license for a worker to engage in clearly improper conduct subsequent to invoking the OHSA: *Toronto Transit Commission*, supra; *General Motors of Canada*, supra. While the OHSA imposes a two-tier investigative structure, the Board has noted that section 24 is not the vehicle for enforcing contraventions of section 23 by the employer, although the failure to conduct the requisite inquiries may well be relevant to an assessment of whether the employer's conduct in a particular case violates section 24: *Continuous Colour Coat*, supra; *International Harvester*, supra; *Dowty*

Equipment, *supra*; *Sidbec Dosco*, *supra*. Given the investigative structure in section 23, the employer has no right to assign alternate work during the initial investigation but whether such an assignment amounts to a breach of section 24 depends on the circumstances of each case: *Dowty Equipment*, *supra*; *North American Plastics*, *supra*. If no alternate work is available when such an assignment is proper pursuant to the OHSA, the worker may be sent home: *International Harvester*, *supra*; *Sidbec Dosco*, *supra*. Finally, where discipline has been imposed for cause, the Board has the jurisdiction by virtue of section 24(7) to vary the penalty in appropriate circumstances: *North American Plastics*, *supra*; *The Corporation of the City of Ottawa*, *supra*; *Camco Inc.*, *supra*; *Toronto Transit Commission*, *supra*; *Commonwealth Construction Co.*, [1987] OLRB Rep. July 961.

70. In turning to the instant complaint, the Board initially considers the argument by counsel for the complainant that, if the worker is correct with respect to the safety of the work, the worker's actions and beliefs must be reasonable. In the instant case, complainant's counsel asserts that secondhand smoke is *per se* dangerous. The Board heard some evidence on the effects of secondhand smoke from Repace. That evidence is not sufficient to establish the proposition as broadly as complainant's counsel asserts. In the Board's view, adjudication of the "correctness" of a worker's belief does not assist in, and would distract from, evaluating the worker's conduct measured against the statutory standard. As noted in the passage quoted earlier from *Domtar*, *supra*, the employee need not be proved correct with respect to the safety of the work to be protected under the OHSA. Thus, the Board rejects counsel's argument. In so doing, the Board stresses that it is not necessary to decide whether or not secondhand smoke is dangerous to determine whether section 24 has been breached. Thus the Board is not pronouncing on that issue.

71. The Board heard testimony from Repace to the effect that the MOL air sampling was defective because respirable particulate matter was not measured. The complainant also voiced her view during the investigative process that the MOL tests were worthless. It is apparent from the evidence that the MOL tested for levels of carbon dioxide, carbon monoxide, formaldehyde, acetaldehyde, valeraldehyde and glutaraldehyde. Temperature, heat and humidity were measured and the ventilation system reviewed to ensure it was operating efficiently. Dranitsaris indicated to the refusing employees that there was no single index for secondhand smoke, rather the MOL measures for trace contaminants known to be emitted in cigarette smoke on the basis that, if the trace contaminants are not detected, the presence of secondhand smoke is insignificant. The results, as stated earlier, were that all levels were well within acceptable guidelines. The Board does not regard the MOL's investigation as cursory or ineffectual (see *Auto Jobbers Warehouse*, *supra*; *Domtar*, *supra*). In any event, the "refusal" did not continue beyond the communication of the inspector's findings and the teleconference of March 22, 1988. The Board does not intend to deal further with this issue.

72. The Board turns to the first refusal on March 9. Some aspects of the complainant's conduct on March 9 and 10 raise concerns as to the *bona fides* of her refusal to work. For example, the complainant refused to go to the health centre (and indeed characterized that direction as a reprimand) although that area was non-smoking and also refused to work in the procurement conference room (another no-smoking enclosed space), yet, conveniently, considered the cafeteria a "safe" place. Smoking is permitted in one-third of the cafeteria and there is no physical barrier between the smoking and no-smoking sections. Notwithstanding some such indications to the contrary, the Board is prepared to assume, without deciding, that the complainant was motivated by health and safety concerns in connection with the initial refusal to work on March 9.

73. The company's response to the initial refusal was consistent with its obligations under section 23 of the OHSA. The company took the refusal seriously. Senior management became per-

sonally involved in seeking a resolution. The MOL investigation did begin somewhat earlier than would otherwise be expected because of the presence of MOL inspectors on site conducting a yearly safety audit. That involvement was not objected to at the time. The company sought the input of the refusing employees and the union health and safety representatives in formulating its proposals for resolving the work refusal (see paragraphs 14, 15 and 16). On March 17, the company met again with the refusing employees to work out the segregation of smokers and non-smokers. All supervisory personnel in procurement were present when the company's proposals were reviewed. In particular, the smoking policy was clarified and supervisors made expressly and immediately responsible for enforcing that policy (paragraph 18). It must be remembered that the company throughout the process repeated its intention to become smoke-free by late 1988 or early 1989. The company wished to reach that goal in stages and to assist financially employees wishing to quit smoking through the "last pack" program. Despite the complainant's refusal to participate in the desk reorganization process, Applegate immediately accommodated the complainant's wish that she no longer sit beside Reid, a heavy smoker. The MOL tests were carried out by the MOL at locations within the procurement office suggested by the refusing employees. Pending the release of the MOL report, the work refusal was apparently resolved in a manner acceptable to the company and the refusing employees.

74. The complainant again refused to work on March 16 and March 17. In response to Hollister's questions, the complainant first indicated that her reason for refusing was the same as before, namely, exposure to secondhand smoke but when on to stress the conduct of Aarons allegedly directed toward her (see paragraph 28). Counsel for the complainant argued that those were new refusals which the company did not investigate or treat seriously. The Board does not regard the categorization of the situation as one continuing refusal or repeated refusals as advancing the analysis because the Board finds that her reasons for these refusals were not *bona fide*. The complainant described to Goncalves her decision to refuse on March 16 as a "continuation" of her refusal. That refusal had been investigated. Further, Hollister sought to respond to the new circumstances (i.e. Aarons' ostensible conduct). The complainant refused to exchange her desk with another person in the no-smoking section of procurement and stated that keeping Aarons' door closed would not alleviate her concerns. From the company's view, there was nothing more to investigate, although Hollister did apprise Spina at the MOL of the new developments. Even if the Board felt some sort of further investigation was required (which the Board does not), such a lapse would not contravene section 24 given the jurisprudence and the circumstances.

75. Despite the complainant's articulating a concern with secondhand smoke, the Board is satisfied that her *real* motivation for her conduct on March 16 and 17 was *not* a concern with health and safety. What triggered the March 16 refusal was a combination of factors. The complainant was unhappy with the location of her desk in the front row farthest from the smoking section but in relative close proximity to the supervisors' offices. She had convinced herself that the location was the result of a conspiracy by management to "keep an eye" on her. She had convinced herself that management had reneged on a promise to erect a partition between the smoking and non-smoking sections although it was clear that no such commitment had been given. She had convinced herself that the location of her desk was a reprisal as was the direction to go to the health centre on the 9th and 10th. She had convinced herself that Aarons was deliberately blowing smoke at her and joking about the work refusals; this she regarded as humiliating and it angered her. She was angry at Woodard's comment at the breakfast meeting despite his direct apology. She was angry at the fact that some of her fellow workers in procurement regarded the work refusal as humorous. In her conversation with the MOL (paragraph 36), she expressed her annoyance with a poster at a fellow employee's desk which read "please hold your breath while I smoke". It was these matters not a genuine concern with health and safety which, taken together, so infuriated the complainant that

she decided on Wednesday to refuse to work. Her words to the MOL inspector on March 17 are revealing: "when I came to work on Wednesday, I thought 'the hell with it' I've had enough."

76. The conclusion that her decision to refuse to work on March 16 and 17 was driven by these other factors and not health and safety, make the complainant's behaviour on those days explicable. The complainant was out to prove a point to the company and her co-workers. In pursuit of some abstract "principle", the complainant maintained contradictory and increasing unreasonable positions. For example, she spoke of a concern with her desk location outside Aarons' office yet refused Hollister's offer to exchange desks with another non-smoker. With Bordian on March 16, she suddenly insisted on an immediate total ban on smoking and replied in the negative to an open-ended query by Bordian as to what might satisfy her. The complainant maintained her position that the company had promised to erect a partition despite the fact that Sharpe and Goncalves expressed the contrary view to her. The complainant appeared pleased that her conduct resulted in the imposition of the one-day suspension. The next day, the complainant's position was even more extreme - nothing whatsoever the company could do would satisfy her. A new allegation, of gender discrimination, was raised with Bordian and then at the MOL meeting thereafter. In the complainant's view, it was entirely the responsibility of management to satisfy her and she need not participate at all. If management, in seeking to accommodate her "guessed wrong", that amounted to a reprisal in her view (viz. the desk location and direction to go the health centre).

77. The Board's finding in the instant case that the complainant's refusal to work was not *bona fide* does not imply that a refusal to work because of secondhand smoke could never satisfy the subjective and then the objective tests. It is simply that the Board has here concluded that the actual motivation on March 16 and 17 was not health and safety and, therefore, the complainant was not protected by the OHSA with respect to her conduct and was subject to discipline for her actions. Further, the Board is satisfied that the company did not impose discipline because the complainant sought enforcement of the OHSA or was acting in compliance with the OHSA. The company took the refusals seriously and complied with its obligations under the OHSA. With respect to the complainant's conduct on March 16 and 17, the company correctly concluded that her refusal to perform her duties was not because of health and safety but was entirely unwarranted. As noted in paragraph 69, where a worker has claimed the protection of the OHSA but that claim is found to be so spurious, as here, cloaking the worker's actual motivation, the employer may impose discipline for conduct which is otherwise improper. The company has met the substantial onus imposed by section 24(5). The imposition of the two suspensions was without taint.

78. Counsel for the complainant asserted that the company had an obligation to assign alternate work and failed to do so. Counsel contended that a smoke-free work location was available given the company's offer of the trailer facilities to the complainant as a work location in November. There is no evidentiary basis on which the Board may find that a trailer was available as an alternate work location in the spring of 1988. The only evidence on this point, which the Board accepts, is that the trailers were fully utilized in that period as offices and classrooms because of an acute space shortage. Only in late 1988 was it possible to free up such space and ensure a smoke-free environment for the complainant, following a determination that it was feasible for the complainant to carry out her job duties there. The Board found a breach of section 24 where a company had a practice of assigning alternate work and did not do so in the specific context described in *North American Plastics*, supra. In the instant case, on March 16, Bordian (as had Hollister) repeatedly asked the complainant if her concerns could be accommodated. The complainant rejected all forms of accommodation short of an immediate total smoking ban and then refused to work at all. On March 17, the complainant reaffirmed that there was nothing the company could do to satisfy her. In the Board's opinion, the company sought to assign alternate work.

Those efforts were thwarted by the complainant's increasingly unreasonable responses. In the circumstances, the Board does not find a breach of section 24 in the failure to provide alternate work on March 16 and 17. Indeed, the Board doubts that any such work existed in view of the complainant's position at that point in time.

79. The Board has concluded that the company did not breach section 24 in imposing the one-day and three-day suspensions or in connection with the alleged misconduct dealt with in paragraphs 58 to 66. In deciding whether to exercise its discretion pursuant to section 24(7) to vary the penalty imposed, the Board has considered the conduct of the complainant throughout and the relatively mild form of discipline imposed. On balance, and in all the circumstances, the Board sees no reason to interfere.

80. For the foregoing reasons, the complaint in Board File 1761-88-OH is dismissed. As noted in paragraph 2, the section 89 complaint in Board File 1563-89-U is also dismissed.

1625-90-OH Terry Bearman & United Electrical Radio & Machine Workers of Canada, Local 520, Complainant v. Boston Insulated Wire and Cable Co., Respondent

Health and Safety - Employer refusing for safety reasons supervisor's order to put more gravel in wheelbarrow - Employee sent home - Board ordering compensation for lost wages

BEFORE: G. T. Surdykowski, Vice-Chair, and Board Members R. W. Pirrie and R. R. Montague.

APPEARANCES: Ralph M. Currie and Steve Farkas for the applicant; A. D. G. Purdy and Dennis M. Olexiuk for the respondent.

DECISION OF G. T. SURDYKOWSKI, VICE-CHAIR, AND BOARD MEMBER R. R. MONTAGUE: December 18, 1990

1. This is a complaint under section 24 of the *Occupational Health and Safety Act*. Upon hearing the evidence and representations of the parties at a hearing held on November 22, 1990, the Board ruled, orally, that the respondent had treated the complainant Terry Bearman in a manner contrary to the provisions of the Act. The Board ordered the respondent to forthwith reimburse Bearman for all wages and benefits he had lost as a result of its unlawful conduct.

2. The material facts are relatively straightforward. Bearman has been employed by the respondent for approximately four years. For the last three years, he has been a strander operator. On June 4, 1990, Bearman was occupied completing an order on his stranding machine (one of two which he normally operates) when William (Bill) Herman, the respondent's General Foreman, instructed him to go outside, get a wheelbarrow, and fill up holes in the plant parking lot with gravel. Bearman had completed two wheelbarrow loads when Herman approached him again a short time later. Herman was not satisfied with the amount of gravel that Bearman was loading into the wheelbarrow and instructed to put more gravel in it. Bearman responded that he would not put more gravel in the wheelbarrow because "the wheelbarrow and terrain were not the best" and he might hurt himself if he did. Bearman sought the assistance of his union steward. Herman, Bearman and the steward went to the shipping/ receiving area where the wheelbarrow was

weighed, first with the gravel in it and then empty. Herman then said he felt too frustrated to deal with the situation at the time and that it would be dealt with after lunch. There was in fact no further discussion or other investigation but Bearman was sent home by Herman after lunch. In the result, Bearman lost three and a half hours in wages and benefits.

3. Subsection 24(1) of the *Occupational Health and Safety Act* provides that:

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

The purpose of the *Occupational Health and Safety Act* is to promote safety in the workplace and protect employee prudence in that respect, while, at the same time, providing a process for resolving health and safety concerns. If the *Occupational Health and Safety Act* is to mean anything, it must be properly used and enforced (*The Corporation of the City of Toronto*, [1986] OLRB Rep. Dec. 1834, *International Harvester Company of Canada Limited*, [1983] OLRB Rep. June 898, *Inco Metal Seal*, [1980] OLRB Rep. July 981).

4. The dispute between the parties in this case in two-fold:

- (a) whether Bearman's refusal to perform the work as instructed was protected by the *Occupational Health and Safety Act*; and
- (b) if so, whether Bearman was penalized by the respondent for exercising his rights under the *Occupational Health and Safety Act*.

The respondent argued that Bearman did not express his safety concerns in a timely manner, that his complaint is frivolous and an abuse of the Act, that he was not, in any event, penalized by the respondent.

5. An employee need not cite chapter and verse of the *Occupational Health and Safety Act* in order to avail him/herself of its protections. On the evidence before the Board, it was clear that Bearman did not refuse to do the work he had been instructed to perform by Herman. What he did refuse to do was to put more gravel in the wheelbarrow. It is also clear that he immediately cited a concern that he might hurt himself as the reason for his refusal.

6. Herman obviously understood that and it was somewhat disingenuous for the respondent to suggest otherwise. Herman himself admitted that he felt "threatened" by Bearman's statement that he might hurt himself. Because he "didn't need an injured employee around" (to use his words), he sent Bearman home for the afternoon. There is no doubt that Herman's action was a direct response to Bearman's refusal to perform the work in question in the manner which Bearman considered to be unsafe.

7. Herman admitted that he has only a passing familiarity with the provisions of the *Occupational Health and Safety Act*. For example, he had no real idea of the kind of investigation

which the Act contemplates will be performed in circumstances where an employee refuses to perform work for safety reasons. Further, he seemed to draw an insupportable distinction between safety related work refusals inside the plant itself and those, as in this case, outside the plant. It is unacceptable that a person in Herman's position be so ignorant of the provisions of the Act and that he show so little appreciation of the purpose of the legislation. Such ignorance, and the potential for abuse to which the Board must also remain vigilant, tend to undermine health and safety in the workplace and have a negative impact on labour relations.

8. There was nothing in the evidence which suggested that Bearman's refusal to perform the work as instructed by Herman was motivated by anything other than a real concern for his own safety. Neither Herman nor anyone else on behalf of the respondent did any investigation even remotely resembling that contemplated by section 23 of the *Occupational Health and Safety Act*. The only explanation offered by Herman for his response was that he felt "frustrated" and threatened by Bearman's refusal. If we are to accept his assertion that Bearman was engaged in a "make work" project, why would it be important to him that Bearman perform the work in the manner Herman wanted him to, which he presumably felt would have resulted in the work being completed more quickly? We prefer the evidence of the Bearman who testified that he was in the process of filling an order on his stranding machine when he was instructed by Herman to perform the outdoor work in question here and that he completed that order on the following day when he returned to work. Bearman's version is more consistent with Herman's apparent desire that Bearman finish the outdoor work more quickly, presumably so that he could return to the order on his strander. Further, there was no cogent evidence to support the respondent's assertion that there was no other work for Bearman to do. (Indeed, even Herman admitted that he could have found other work for Bearman.) Finally, we discerned no threat to Herman.

9. In the circumstances, it was difficult to see how Herman's response could be characterized as being anything other than a half day (three and a half hour) suspension which he imposed on Bearman because he refused to perform the work in question in what he considered to be an unsafe manner.

10. In the result, the Board was satisfied that Bearman's work refusal was for honestly held safety concerns, that the respondent failed to respond in an appropriate manner either as contemplated by section 23 of the *Occupational Health and Safety Act* or otherwise, and that the respondent disciplined Bearman for his safety-related work refusal contrary to subsection 24(1) of the Act. The Board therefore ordered the respondent to compensate Bearman for the wages and benefits he lost as a result of the respondent's unlawful conduct (see paragraph 1 above).

DECISION OF BOARD MEMBER R. W. PIRRIE: December 18, 1990

1. I concur with the majority that section 24 of the *Occupational Health and Safety Act* was violated by the employer in that Mr. Herman did not follow section 23 of the Act when Mr. Bearman expressed concern that he might hurt himself if he were to place more gravel in the wheelbarrow. Consequently, I also concur that Mr. Bearman should be compensated for the lost pay and benefits as a result of being sent home by Mr. Herman.

2. I am also troubled that Mr. Herman was not more knowledgeable about the appropriate provisions of the *Occupational Health and Safety Act*. Had he been, and had he extended as much effort in following the procedures laid out in section 23(3), (4) and (5) of the Act as he did in initially weighing the wheelbarrow and its contents and conducting his subsequent tests to establish the effort which would have been required by Mr. Bearman to move it, this event likely would have ended at the time.

3. That said I am not satisfied Mr. Bearman was entirely genuine when he expressed his concern that he might injure himself if he followed Mr. Herman's direction to place more gravel in the wheelbarrow. Based on the employer's evidence as to the weight of the wheelbarrow and gravel and the effort required to lift it, I cannot accept that Mr. Bearman would have been at risk, regardless of the terrain. His refusal, in my opinion, amounted to a borderline use of the Act.

4. The *Occupational Health and Safety Act* must be used for its intended purpose, and not to further some other unrelated agenda. Ignorance on the part of employers and abuse on the part of employees undermine the value of the legislation and tend to have a negative impact on labour relations.

3107-89-U Everette Chapelle, Complainant v. Amalgamated Transit Union Local 113, Respondent v. Toronto Transit Commission Wheel Trans Department, Intervener

Duty of Fair Representation - Health and Safety - Practice and Procedure - Unfair Labour Practice - Employer not proper party to fair representation complaint involving discharge, where justness of discharge determined in earlier Board proceeding under Section 24 of the Occupational Health and Safety Act

BEFORE: Robert Herman, Vice-Chair, and Board Members J. A. Rundle and B. L. Armstrong.

APPEARANCES: Everette Chapelle on his own behalf; L. C. Arnold and R. Jones for the respondent; J. Lynn Thomson for the intervener.

DECISION OF THE BOARD; December 20, 1990

1. This is a complaint filed pursuant to the provisions of section 89 of the *Labour Relations Act*, in which the complainant alleged that the respondent union breached sections 68 and 89(7) of the Act, and the intervener employer sections 70 and 80 of the Act.

2. In a prior decision, dated June 20, 1990, the Board dismissed the complaint insofar as it sought to rely upon the provisions of sections 70 and 80 of the Act. The alleged breaches of sections 68 and 89(7) of the Act were not dealt with by the Board at the first hearing date.

3. Having regard to the submissions of the parties, the Toronto Transit Commission Wheel Trans Department is hereby made an intervener to these proceedings.

4. With respect to the alleged breach of section 89(7) of the Act by the respondent union, in response to a request for particulars, the complainant Mr. Chapelle orally provided particulars at the hearing on August 21, 1990. In a prior Board proceeding (Board proceeding No. 0925-86-U) Minutes of Settlement were entered into between the complainant and the union and the complainant's employer at the time, All Way Transportation. One of the terms of that settlement was that the respondent union "agrees to provide the complainant with a written explanation in the event it refuses to proceed with a grievance initiated by the complainant." Mr. Chapelle alleges that the union has breached section 89(7) of the Act in that it has on certain specified occasions not provided the written explanation for why it refused to proceed with a grievance he initiated. Mr.

Chapelle identified the circumstances in which the union had not provided the required written explanation as follows:

- (1) The grievance leading to the instant section 68 complaint.
- (2) On or about November 25, 1986, Mr. Chapelle was approximately fifteen minutes late for work, and punched his time card at 6.15 a.m. He was suspended for this and wished to file a grievance. He was not allowed to, and was refused by Wayne Clearwater, the Vice-President of the union at the time.
- (3) On or about November 30, 1986, Mr. Chapelle met with Earle Fitzsimmons to discuss the matter, and he was told that Mr. Fitzsimmons had spoken to Mr. Clearwater and Mr. Fitzsimmons would not accept the grievance.

5. Although Mr. Chapelle submitted that he never got a written explanation from the union when it rejected his many grievances, when directed by the Board to indicate the specific grievances when this occurred, he identified only those set out immediately above.

6. As the particulars of the section 89(7) complaint were provided for the first time at the hearing on August 21, 1990, the respondent union sought an adjournment in order to investigate the matter. Over the objection of Mr. Chapelle, the Board indicated it would not deal forthwith with the complaint under section 89(7), but would grant an adjournment in order to enable the respondent and intervenor an opportunity to investigate the matter. It further ruled that the section 89(7) complaint would be restricted to those particulars provided orally by Mr. Chapelle and those, if any, contained in the written materials filed to date.

7. We turn now to consider the section 68 complaint. Mr. Chapelle complains that the union failed to assist him with his discharge grievance, and failed to take his grievance to arbitration. By way of remedial relief, Mr. Chapelle asks that the Board direct that his grievance proceed to arbitration, and that he be reimbursed for all damages he has suffered as a result of the union's breach, including wages, benefits, reinstatement of seniority, and any other appropriate damages.

8. In a preliminary objection, the employer argues that the propriety of Mr. Chapelle's discharge has already been litigated, in Board proceeding 0815-89-OH, a complaint pursuant to section 24(1) of the *Occupational Health and Safety Act* ("OHSA") which the Board dismissed. The employer asserts that as part of that proceeding, the discharge of Mr. Chapelle was found not to be unjustified. Mr. Chapelle chose to file a complaint under the *Occupational Health and Safety Act*. The employer submits that because of the broad remedial relief available to a complainant pursuant to section 24(7) of that Act, through which the Board could have reinstated Mr. Chapelle and awarded all appropriate compensation and other relief, that adjudication involved the very same matter that is before the Board in the instant complaint. Indeed, in his section 24 complaint form Mr. Chapelle was seeking reinstatement and compensation, as he does in the instant complaint. The employer submits therefore that the justness of Mr. Chapelle's discharge has already been decided and ought not to be relitigated in the instant complaint, on the basis of the principles of *res judicata* or issue estoppel. Even if the decision of the Board dismissing that complaint does not explicitly indicate that the Board considered the appropriateness of the discharge, that issue was before the Board and cannot now be raised. Mr. Chapelle had an obligation to put his entire case before the Board, including the appropriateness of the discharge pursuant to section 24(7) of that Act, and the Board had an obligation pursuant to that same subsection to consider whether the discharge was appropriate in all the circumstances. The employer submits that it is a party in

the instant proceeding only because of its potential liability for Mr. Chapelle's discharge, a discharge which has in effect been upheld by the Board. It is therefore not open to Mr. Chapelle, in the guise of a section 68 complaint under the *Labour Relations Act*, to seek to relitigate the justness of the discharge. Accordingly, submits the employer, the complaint, insofar as it is founded upon any potential liability against the employer, ought to be dismissed.

9. The respondent union agrees with and adopts the submissions of the intervener employer.

10. Mr. Chapelle submits that the two proceedings are dealing with two different matters. In the earlier health and safety complaint, Mr. Chapelle was complaining (he submits) about an incident that occurred on May 1, 1989. In the instant complaint, he claims that he is complaining about an incident that occurred on May 6, 1989. In this respect, Mr. Chapelle submits that the two complaints are dealing with entirely different matters. He argues that the prior decision of the Board did not deal with the incident of May 6, 1989, the subject matter of the instant complaint.

11. We accept, for purposes of this issue, the facts as asserted by Mr. Chapelle in his complaint and oral submissions, except where they cannot stand in light of the prior decision of the Board. On May 10, 1989, Mr. Chapelle was discharged by the intervener employer. He approached the union to file a grievance on his behalf and to take his discharge grievance to arbitration. On June 18, 1989, his grievance was considered at a meeting of union members, and the membership of the bargaining unit voted against taking the grievance to arbitration. The Executive of the union apparently recommended against the matter proceeding to arbitration. Mr. Chapelle asserts that the union contravened section 68 with respect to this conduct.

12. On June 22, 1989, shortly after the union decided not to take his grievance to arbitration, Mr. Chapelle filed the complaint under section 24 of the *OHSA*. In that complaint Mr. Chapelle indicated that the union had "failed to address grievance under collective agreement". He further alleged that the intervener employer had violated his rights under various provisions of the *OHSA* by terminating his employment because he exercised his rights under that statute.

13. In a decision of the Board, differently constituted, on January 26, 1990, the Board dismissed that complaint, and in so doing wrote, in part, as follows:

12. It is the finding of the Board that Mr. Chapelle was dismissed from his employment with the respondent because of his refusal to work his assigned shift. During the meetings on May 6 and 8 there was no reference to the *Occupational Health and Safety Act* by Mr. Chapelle. During those two meetings his attention was focused on the *Employment Standards Act*. At an earlier point in time Mr. Chapelle channelled his energies towards a consideration of the *Highway Traffic Act*. It appears to the Board that Mr. Chapelle knew exactly the hours and days of the week he wished to work. If he worked the thirteen hour shifts he could apparently enjoy his preferred days of leisure. On the other hand if he was prepared to work the ten hour shifts he could not always enjoy his preferred days of leisure. He was unwilling or unable to work the thirteen hour shifts and therein lay his dilemma. It further appears that Mr. Chapelle determined that his appropriate response was to try and shorten his thirteen hour shift to a customized length of his liking. To this end he endeavoured to keep the pressure on the respondent by raising spurious allegations that the respondent had variously violated the *Highway Traffic Act*, the *Employment Standards Act*, and the *Occupational Health and Safety Act*. In this complaint we are dealing directly with only the latter Act. An investigation by an inspector under that Act failed to disclose any violation thereof. The evidence before the Board completely fails to disclose a violation of any section of the *Occupational Health and Safety Act*. This complaint is accordingly dismissed.

14. Mr. Chapelle then sought reconsideration of the decision dismissing his complaint and the Board, in a decision dated March 23, 1990, declined to reconsider its decision. On March 16,

1990, before Mr. Chapelle would have received the decision of the Board denying his request for reconsideration, he filed the instant complaint. We note that in the complaint form he claims that, at 9:00 a.m. on the day of his health and safety complaint hearing, he asked the union to assist him. At the hearing, however, his submissions made clear that he was complaining of the union's failure to take his grievance to arbitration.

15. Section 68 of the *Labour Relations Act* reads as follows:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

16. Section 24 of the *Occupational Health and Safety Act* reads as follows:

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 89 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications, as if such section, except subsection (5), is enacted in and forms part of this Act.

(4) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), sections 102, 103, 106, 108 and 109 of the *Labour Relations Act* apply, with all necessary modifications.

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

(6) The Ontario Labour Relations Board shall exercise jurisdiction under this section on a complaint by a Crown employee that the Crown has contravened subsection (1).

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

(8) Notwithstanding subsection (2), a person who is subject to a rule or code of discipline under

the *Police Act* shall have his complaint in relation to an alleged contravention of subsection (1) dealt with under that Act.

17. Whether it was necessary for the Board in the earlier health and safety complaint to have expressly referred in its decision to the propriety of his discharge pursuant to sections 24(1) and 24(7) of the *OHSA*, that issue was before the Board by virtue of the provisions of those two sections. A complaint filed under section 24(1) of the *OHSA* raises for consideration the effect and application of section 24(7). In filing the complaint, it was incumbent upon Mr. Chapelle to have raised and argued his entire case, including any reliance upon the provisions of section 24(7). Under section 24(7) of *OHSA*, the Board had the jurisdiction to consider the justness of his discharge, even though it found no breach of section 24(1) by the employer (see *Commonwealth Construction Company*, [1987] OLRB Rep. July 961). The propriety of Mr. Chapelle's discharge was therefore a matter that was either considered by the Board in the earlier proceeding, or one that Mr. Chapelle could have and should have raised as part of that proceeding if he intended to dispute it. In either event, the propriety of his discharge was part of the earlier litigation. As the Court of Appeal wrote in *Bernier and Bernier* (1989) 62 D.L.R. (4th) 561, at 564:

The doctrine of *res judicata* was stated thus by Sir James Wigram V.-C. in *Henderson v. Henderson* (1843), 3 Hare 100 at pp. 114-5, 67 E.R. 313 (Ch.):

In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

In these circumstances, it would neither be fair nor appropriate to allow Mr. Chapelle to relitigate that part of his complaint that complains about the employer having wrongfully discharged him. Where a particular matter has already been litigated between two parties, as it has here, it would operate to the extreme prejudice of one of the parties if, through the mechanism of raising the same "matter" through a different section of the Act, the same issue were to be relitigated. Board decisions would lose any aspect of finality. Parties could seek to have their cases heard again by raising the same issue under a different section of the Act. The question of the employer's liability (and any consequential remedy against the employer) arising out of Mr. Chapelle's discharge has already been fully adjudicated between Mr. Chapelle and the employer. That matter is over and finished. No issue concerning the employer remains in this section 68 complaint. We conclude that the employer in the circumstances is not subject to any potential liability in the section 68 complaint, and it will therefore no longer be a party in the section 68 complaint.

18. Does an issue involving the union remain to be determined in this section 68 complaint? Mr. Chapelle first attempted to have his dispute with the employer adjudicated through the arbitration provisions obtained in the collective agreement. On or about June 18, 1989, the membership of the bargaining unit voted against taking Mr. Chapelle's grievance to arbitration. It was because of that decision that Mr. Chapelle elected to file his own occupational health and safety complaint.

19. But although he asserts that the membership's decision not to go to arbitration

breached section 68, and although he complains that the union did not assist him with his grievance, Mr. Chapelle has not indicated any harm, damage, or injury that Mr. Chapelle might have suffered as a result of the union's failure to take his grievance to arbitration. Even if the union's failure to assist him or take his grievance to arbitration were to be a breach of section 68, there does not appear to be any harm suffered which is causally connected to such breach. Mr. Chapelle did obtain an adjudication of his discharge, in the health and safety complaint before the Board, on the basis discussed above. It was this impartial adjudication which he sought by filing his grievance, and by requesting the union's assistance, and which he complains here that the union did not give him. But, in effect, he received it. As Mr. Chapelle did obtain the adjudication he sought, and as he has not indicated any harm he might have suffered because of the union's actions, the Board declines to inquire further into this complaint.

20. For these reasons, the section 68 complaint is dismissed.
21. This matter will be relisted to deal with the sole remaining issue, the complaint insofar as it relies upon the provisions of section 89(7) of the *Labour Relations Act*.
22. This panel is seized.

ADDENDUM OF BOARD MEMBER J. A. RUNDLE: December 20, 1990

Based on the facts of this case I concur with the Board's ultimate disposition of this matter. My concurrence in the present case is however, in no way an endorsement of the Board's reasoning and finding in *Commonwealth Construction Company*, [1987] OLRB Rep. July 961 referenced in paragraph 17.

1062-90-R IWA-Canada, Local 1-2995, Applicant v. Chapleau Forest Products Limited, Respondent v. Group of Employees, Objectors

Adjournment - Certification - Evidence - Membership Evidence - Petition - Trade Union - Trade Union Status - Technical amendment of application permitted to show true name of union - Membership cards headed by name of local union bringing application, but body of cards referring only to national union - Cards valid membership evidence for local union - Adjournment request on grounds of unavailability of objecting employee counsel denied - Petition circulated on employer premises and during working hours - Petitioners observed by foreman - Petition not voluntary expression of employee wishes - Certificate issuing

BEFORE: Ken Petryshen, Vice-Chair, and Board Members W. H. Wightman and R. R. Montague.

APPEARANCES: Paul Falzone, Norm Rivard, Rene Brixhe, Leopold Fontaine and Guy Robitaille for the applicant; Robert N. Gilmore and Eric Scheffers for the respondent; Harold M. Routledge and Rachel Pressé for the objectors.

DECISION OF KEN PETRYSHEN, VICE-CHAIR, AND BOARD MEMBER R. R. MONTAGUE; December 14, 1990

1. This is an application for certification filed on July 18, 1990 by IWA-Canada, Local 1-

2995 ("Local 1-2995") in which it seeks to represent a bargaining unit of employees employed by Chapleau Forest Products Limited ("Chapleau Forest" and "the Employer"). (The application was initially filed naming IWA Canada, Local I-2995 as the applicant and, as one will see below, the Board granted the applicant's request to amend the application.) A Labour Relations Officer met with the parties in Timmins on August 16, 1990 at which time the parties resolved some issues and identified the issues in dispute. The hearing of the application began in Timmins on August 23, 1990, continued on September 20 and was completed on September 21, 1990. At the conclusion of the hearing, the Board advised the parties that it was reserving its decision on whether the petition filed in opposition to the application represented the voluntary intention of those employees who signed it.

2. Prior to entertaining evidence relating to the voluntariness of the petition, the Board was called upon to decide three issues. Since the Board had not found the applicant to be a trade union in any previous proceeding, one issue concerned the applicant's status. The other two issues are somewhat related. They concerned the proper name of the applicant and the form of the membership evidence filed by the applicant in support of its application for certification. After entertaining the evidence and the parties' submissions relating to these three issues and after recessing to consider the matters, the Board provided the parties with oral rulings at the hearing on August 23, 1990.

3. Prior to March 1988, Local 2995 was a local union of the United Brotherhood of Carpenters and Joiners of America. In March 1988, an agreement was executed to transfer the members and jurisdiction of Local 2995 to the IWA-Canada. IWA-Canada has issued a charter to the local with the number 1-2995. Having regard to the oral and documentary evidence before us, the Board was satisfied that IWA-Canada, Local 1-2995 is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and so advised the parties at the hearing.

4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in the Town of Chapleau, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. In order to appreciate the nature of the other two issues, it is necessary to review the recent history relating to IWA-Canada and Chapleau Forest. On May 14, 1990, IWA-Canada applied for certification for the same bargaining unit of employees as in the present application and requested a pre-hearing representation vote. The evidence of membership filed in support of the application consisted of cards in which persons applied to become members of IWA-Canada. The vote was conducted on June 21, 1990 and the IWA-Canada was not successful. In a decision dated July 23, 1990, the Board dismissed the application and imposed in the circumstances the usual six-month bar against the applicant in that matter, the IWA-Canada.

6. As noted above, the present application was filed with the Board on July 18, 1990 by a local union of IWA-Canada and not by the national union. The applicant named in this matter is IWA-Canada, Local I-2995 rather than the correct name of the applicant, which is IWA-Canada, Local 1-2995. The evidence discloses that the applicant in the past has not been careful when referring to itself and has used interchangeably the letter I and a 1 before 2995. As indicated previously, the Charter issued to the applicant discloses that its correct name is IWA-Canada, Local 1-2995. Counsel for the applicant requested leave of the Board to amend the name of the applicant to reflect its correct name.

7. In support of the present application, the applicant filed "fresh" membership evidence. The following is a sample of the membership card utilized by the applicant in this case.

APPLICATION FOR MEMBERSHIP
IWA - CANADA, LOCAL 1-2995
Affiliated with CLC
(Please Print)

NAME _____

ADDRESS _____

CITY _____

Employee of _____

Birth Date _____ Phone _____

I hereby request and accept membership in the **IWA-CANADA** and of my own free will thereby authorize this union to act for me as the collective bargaining agency in all matters pertaining to rates of pay, wages, hours of employment or other conditions of employment.

I hereby certify that the amount shown below, was paid by me to be applied to initiation fees or monthly dues of the Union, and as evidence of good faith in my application for membership.

Amount- ONE -X/100 Dollars Date

Signature of
Applicant

Signature of Receiver
of above money

8. Counsel for the respondent opposed the request for an amendment to the applicant's name. Counsel submitted that membership evidence filed in support of the application was in reality membership evidence in IWA-Canada and not Local 1-2995. This submission was based on the following wording on the card: "I hereby request and accept membership in IWA-Canada" with no such reference to Local 1-2995. Given the imposition of the six-month bar against IWA-Canada and the form of the membership evidence filed with the application, counsel argues that the Board should dismiss this application. Counsel also argues that the membership evidence is such that no reasonable employee would be in a position to know what organization he or she was joining. If the Board did not find in favour of the respondent on these matters, counsel for the respondent requested the Board to adjourn the hearing in order to give the respondent the opportunity to review the Board's written reasons for its rulings. Counsel for the applicant opposed these positions while the representative of the objecting employees did not take a position on these issues. During argument on these matters, the parties referred to the following cases: *Le Droit Ltee.*, [1970] OLRB Rep. Dec. 945; *Bernardin of Canada Limited*, [1975] OLRB Rep. Oct. 737; *The Journal Publishing Company of Ottawa, Limited*, [1974] OLRB Rep. July 499; *Swingline of Canada Ltd.*, [1971] OLRB Rep. Nov. 710; *Union Electric Supply Co. Limited*, [1983] OLRB Rep. May 829; *The Corporation of the City of Gloucester*, [1989] OLRB Rep. Aug. 846; *Opera Ghost Productions Inc.*, [1990] OLRB Rep. March 325; *Repla Limited*, [1990] OLRB Rep. May 612; *The Clorox Company of Canada Ltd.*, [1980] OLRB Rep. Feb. 184; and *Menkes Developments Inc.*, [1987] OLRB Rep. Oct. 1290.

9. The Board advised the parties in its oral ruling on August 23, 1990 that it was satisfied in the circumstances of this case that it was appropriate to amend the application to reflect the correct name of the applicant. In the Board's view, the error on the part of the applicant was merely a technical defect and the granting of the amendment would not prejudice any party to the proceeding. The name of the applicant on the application and its real name are so similar and the defect so

insignificant that no reasonable person could be mistaken with respect to who the applicant was in this proceeding.

10. The majority of the panel, with W. H. Wightman dissenting, orally ruled at the hearing that it could find no basis for dismissing the application, having regard to the membership evidence filed by Local 1-2995. In circumstances virtually identical to those before us, the Board in *Menkes Developments Inc., supra*, determined that the form of the membership evidence was a reliable indication that the employees who signed those cards were members of the applicant. The membership card in that case was different only to the extent that it had a receipt portion which specified the local union. In the majority's view, this is not a material difference. In response to an argument that the cards were ambiguous and were not sufficient to support certification without a vote, the Board wrote the following:

10. Evidence of membership in an International Union is not generally accepted by the Board as evidence of membership in a local thereof. (See for example *Bernardin of Canada Limited*, [1975] OLRB Rep. Oct. 737). However, membership in a local is accepted as evidence of membership in the parent international (see for example *The Explorer Inns, Limited*, [1978] OLRB Rep. June 541). In every case, however, the Board will examine the material facts and an apparent ambiguity in the documentary evidence will not be fatal provided that, as a whole, it points unequivocally to membership in the applicant (see for example *Wallaceburg Hydro Electric Systems*, [1975] OLRB Rep. Oct. 783; *Union Electric Supply Co. Limited*, [1983] OLRB Rep. May 829; *General Motors of Canada Limited*, unreported decision of the Board dated December 28, 1984 in Board File No. 2418-84-R). It was the Board's view that the documentary evidence filed in support of this application is sufficiently unambiguous for the Board to be satisfied that it relates to the applicant and that no reasonable employee would have been confused by it. The cards are clearly applications for membership. Further, both the application and receipt portions refer clearly to the applicant. The cards are clearly applications for membership in both the Labourers' International Union of North America and its Local 506. Accordingly, the Board ruled orally that the applicant's documentary evidence of membership is a reliable indication that the employees to whom it relates were members of the applicant.

11. Since Local 1-2995 is the applicant, it is required to support the application with applications for membership in Local 1-2995. Applications for membership in IWA-Canada will not suffice. In effect, counsel for the respondent argues that the application for membership cards filed with the application only relate to IWA-Canada, or are at least so ambiguous that effect should be given to the bar imposed as a result of the previous application. The Board was satisfied that the documentary evidence filed with the application relates to the applicant and that reasonable employees would not have been confused by it. As in *Menkes Developments Inc., supra*, the cards before us are applications for membership. In contrast to the cards used in the previous application, which referred only to IWA-Canada, the cards supporting this application refer clearly to Local 1-2995, the applicant. When one examines the membership cards as a whole, it is clearly an application for membership in both IWA-Canada and its Local 1-2995. It is for these reasons that the majority ruled that the applicant's documentary evidence of membership relates to employees who applied to become members of the applicant.

12. In its oral ruling, the Board also advised the parties that it would not adjourn the hearing in order to provide them with written reasons for its rulings. In the Board's view, it is important to deal with matters before the Board, particularly certification matters, as expeditiously as possible. In these circumstances, no valid labour relations purpose would have been served by adjourning until written reasons could be provided.

13. After dealing with the matters referred to above, the Board proceeded to hear the evidence concerning the only remaining issue in dispute, namely the voluntariness of the petition. At the conclusion of the hearing at approximately 5:30 p.m. on August 23, 1990, the cross-examina-

tion of the first witness for the objecting employees was only partially completed. The Board offered the parties some continuation dates and, since they agreed the hearing could be completed in two additional days, September 20 and 21, 1990 were fixed for the continuation of the hearing.

14. On September 19, 1990, the Board received the following communication by Fax from Mr. David Zimmer:

Re: IWA - Canada, Local I-2995, and Chapleau Forest Products Limited

This is to advise that I have been retained today to represent the Petitioners in this matter, scheduled for continuation at Timmins, Ontario on September 20th and 21st, 1990.

I am requesting an adjournment of the proceedings to enable me to prepare and adequately deal with the various issues which I understand to be rather complex.

Mr. Falzone does not consent. Mr. Gilmore does consent.

Yours very truly,

"David Zimmer"
David Zimmer

The Registrar followed the Board's usual practice in such circumstances by advising Mr. Zimmer in writing that a party seeking an adjournment must obtain the consent of all parties to the proceeding, otherwise such request must be made to the panel hearing the case on September 20, 1990.

15. When the hearing resumed in Timmins on September 20, the objecting employees appeared without counsel. They advised the Board that they had been advised by their lawyer not to proceed with the case in his absence. The Board interpreted their comment as a request for an adjournment and proceeded to hear representations from the parties on this issue.

16. In essence, the objecting employees requested that the proceeding be adjourned in order that they could make arrangements to have their lawyer present. They advised the Board that they contacted Mr. Zimmer during the previous week and both before and after this contact they attempted to raise funds to pay for a lawyer. The objecting employees indicated that they advised Mr. Zimmer on September 19 that they wanted him to act for them. They stated that Mr. Zimmer advised them on the evening of September 19 that he was unable to attend the hearing on September 20. On behalf of Chapleau Forest, Mr. Gilmore consented to the adjournment. Mr. Falzone, on behalf of Local 1-2995, strenuously objected to the granting of an adjournment and emphasized the prejudice his client would face if an adjournment were granted.

17. After entertaining the parties' representations and after recessing to consider the matter, the majority of the panel, with W. Wightman reserving his decision, ruled orally at the hearing that it would not grant the adjournment request. Mr. Wightman now concurs with the ruling of the majority. Our reasons for this ruling are as follows:

18. The following excerpt from *Catalyst Technology (Canada) Ltd.*, [1987] OLRB Rep. June 803 at page 805 comments on the Board's practice when faced with adjournment requests:

The usual practice of the Board is to grant an adjournment only on the consent of all of the parties to a proceeding, or where a request for an adjournment is based on circumstances which are beyond the control of the party making the request and where to proceed would seriously prejudice such party. See, for example, *Northwest Merchants Ltd. Canada*, [1983] OLRB Rep. July 1138, in which the Board wrote, in part, as follows (at paragraph 7):

...The Board has a discretion to adjourn any hearing, if it considers it advisable in the interests of justice, for such time and to such place and upon such terms as it considers fit (see section 82(1) of the Board's Rules of Procedure; see also section 21 of the Statutory Powers Procedures Act, R.S.O. 1980, c. 484). In exercising this discretion, the Board has adopted a policy which recognizes the great importance of expedition to the efficacious administration of the *Labour Relations Act*. In *Labour Relations Bureau of Ontario General Contractors Association*, [1979] OLRB Rep. 1036, at paragraph 8, the Board stated:

“...The usual practice of the Board is to grant adjournments only on the consent of all of the parties to a proceeding. With respect to situations where one party is not prepared to agree to an adjournment, in the *Baycrest Centre of Geriatric Care* case, [1976] OLRB Rep. 432, the Board stated at page 433:

5. The Board policy with respect to adjournments has been capitalized in the *Nick Masney* case [1968] OLRB Rep. 823 (upheld in the Ontario Court of Appeal ¶70 CLLC 14,024) wherein the Board stated: ‘... the Board’s decision to deny the respondent’s request for an adjournment was based on the Board’s practice to grant adjournments only on consent of the parties or where the request is based on circumstances which are completely out of the control of the party making the request and where to proceed would seriously prejudice such party i.e., where it is proven that a witness essential to the party’s case is unable to attend because of serious illness...’”

The powers of the Board with respect to adjournments were confirmed by the Ontario Divisional Court in *Re Flamboro Downs Holdings Ltd. and Teamsters Local 879* (1979), 24 O.R. (2d) 400, at pages 404 and 405:

“Clearly, an administrative tribunal such as the Labour Relations Board is entitled to determine its own practices and procedures. Whether in a given case an adjournment should or should not be granted is a matter to be determined by the Board charged as it is with the responsibility of administering a comprehensive statute regulating labour relations. In the administration of that statute the Board is required to make many determinations of both fact and of law and to exercise its discretion in a variety of situations. In the case of a request for adjournment, it is manifestly in the best position to decide whether, having regard to the nature of the substantive application before it, the adjournment should be granted or whether the interests of the employer, the employees or the union who, as the case may be, oppose the adjournment should prevail over the party seeking it. As a matter of jurisdiction, it is for the Board to decide whether it should adjourn proceedings before it and in what circumstances.

This is not to say that there cannot be situations in which a refusal to grant an adjournment might amount to a denial of natural justice. There are circumstances in which that might be so: see, for example, *R. v. Ontario Labour Relations Board, Ex p. Nick Masney Hotels Ltd.* [1970] 3 O.R. 461, 13 D.L.R. (3d) 289 (C.A.); *Re Gill Lumber Chipman* (1973) Ltd. and *United Brotherhood of Carpenters & Joiners of America, Local Union 2142* (1973), 42 D.L.R. (3d) 271, 7 N.B.R. (2d) 41. It is necessary to examine the facts of each case to determine if the tribunal acted, as it must, in a fair and reasonable way. It must, of course, comply with the provisions of the *Statutory Powers Procedure Act* 1971 (Ont.) c.47, and afford the parties the opportunity to be present and be represented if they wish by counsel. But a party

who has adequate notice of the hearing does not have a right to an adjournment and is not entitled to insist on one for his convenience or the convenience of his representative. It is for the Board to determine whether to adjourn on the basis of the obvious desirability of speedy and expeditious proceedings in labour relations matters, the background of the particular case, the issues involved, the reason for the request and other like factors.

• • •

It cannot be suggested that the Board may not in the exercise of its discretion adopt a general policy respecting adjournments of its proceedings: see *The King v. Port of London Authority, Ex. p. Kynock, Ltd.*, [1919] 1 K.B. 176. That policy is obviously necessary to the proper administration of the Board's process..."

19. In *Joe Portiss*, [1983] OLRB Rep. Sept. 1554, a complainant requested an adjournment on the ground that between the first and second day of hearing he had discharged his counsel and needed time to retain and instruct a new lawyer. The following comments and reasons of the Board for denying the adjournment are applicable to the circumstances before us.

It is the general practice of the Board not to grant an adjournment unless it is agreed to by the parties, except in extraordinary circumstances. Extraordinary circumstances would generally include unforeseen events beyond the control of a party, such as illness or difficulties in travel due to severe weather. The Board does not generally adjourn a hearing on the request of a party for time to seek legal counsel, particularly where that party had ample notice of the hearing and a reasonable time to retain and instruct counsel beforehand. In this case Mr. Portiss had, by his own admission, some nine days between his disagreement with his former counsel and the resumption of the compensation hearing. We do not see in these circumstances any reason to grant an adjournment merely because the complainant was not entirely satisfied with the Board's interim rulings. Among the items of dissatisfaction Mr. Portiss cited the failure of counsel to adduce evidence to explain why Mr. Portiss voluntarily took a layoff from a job with Combustion Engineering. Given the Board's determination in paragraph 30 of its decision of July 11, 1983 that that event would weigh against Mr. Portiss in the assessment of compensation, we are satisfied that he was or should have been aware of that outcome over two months ago. In our view he had ample time to attempt to retain and instruct counsel, or to weigh and accept the alternative of completing the hearing with the lawyer he initially retained. The Board is also mindful of the prejudice which an indefinite adjournment could cause the respondent union, whose membership has obviously been divided by the ongoing controversy surrounding this complaint. Fairness to both parties and concern for the labour relations process require that this matter be disposed of without undue delay, in keeping with the Board's normal rules of procedure. For the foregoing reasons the Board ruled at the hearing that it would not depart from its normal procedures and that Mr. Portiss' request for an adjournment was denied.

20. The parties to this proceeding were advised by a notice dated July 25, 1990 that a hearing was scheduled for August 23, 1990 at Timmins. The objecting employees appeared at the August 23 hearing without counsel and participated in the proceeding. Subsequent to the August 23 hearing, they determined that they wished to be represented by counsel. The objecting employees had approximately one month to select and instruct a lawyer who would be available for the continuation of the hearing. They did not make any effort to contact a lawyer until the week prior to September 20 and it appears they did not retain him until September 19. The objecting employees had sufficient time to obtain the services of a lawyer who would have been able to represent them at the continuation of the hearing on September 20. The Board has before it a certification matter with a petition, which from a labour relations perspective requires a speedy and expeditious resolution. The objecting employees requested the adjournment for their convenience or for the convenience of their lawyer and as the Court noted in *Re Flamboro Downs Holdings Ltd. and Teamsters Local 879, supra*, a party is not entitled to insist on an adjournment on such grounds.

When weighing the competing interests, the majority was satisfied that it would have been inappropriate to grant an adjournment in the circumstances of this case.

21. After providing the parties with the ruling denying the adjournment, the Board set the matter down for some time in order to give the objecting employees time to consider whether they would take their lawyer's advice or continue to participate in the hearing. Ultimately, they determined that they would continue to participate.

22. We turn now to the issue of whether the petition represents a voluntary expression of employee wishes. R. Pressé and H. Routledge testified concerning the petition and they called R. Brixhe and M. Marquis to give evidence. Counsel for Chapleau Forest called E. Scheffers to testify. Local 1-2995 called J. Mitchell, J. Hoffman and R. LeClerc to give evidence. In making our factual determinations, the Board has carefully reviewed all of the oral and documentary evidence and the parties' submissions relating thereto.

23. Ms. Pressé and Mr. Routledge were the two bargaining unit employees primarily involved in securing support from employees who opposed the certification of the applicant. As noted earlier, the IWA-Canada lost a representation vote held on June 21, 1990. It was within a short time after the vote that Ms. Pressé and Mr. Routledge, as well as other employees, noticed that another campaign to secure membership cards was in progress. Since they felt the employees had spoken on the issue of unionization and since they understood a bar of some duration would be imposed on the union, some employees decided to oppose the certification of the applicant after they determined that there would be some support for such an effort among the employees. Ms. Pressé and Mr. Routledge assumed the task of preparing the petition and circulating it in an effort to secure signatures.

24. The Board heard extensive evidence concerning the origination, preparation and circulation of the petition. We find it unnecessary to set out this evidence in detail. After canvassing the views of some employees, Ms. Pressé and Mr. Routledge prepared the document on July 19, 1990 and beginning on that day until July 26, 1990, Ms. Pressé and Mr. Routledge circulated their petition attempting to secure signatures from employees. They had prepared three separate pages, two with the preamble in English and one with the preamble in French. Mr. Routledge primarily approached the English employees while Ms. Pressé approached both French and English employees. When approaching employees, they briefly explained the purpose of the petition and advised employees it would only be sent to the Labour Relations Board and the local MP and MPP. The majority of the signatures on the petition were placed there by employees while on the Employer's premises. The petition was sent to the Board prior to the time Local 1-2995 filed its application for certification. Although some employees signed the petition prior to signing a membership card, Ms. Pressé and Mr. Routledge were able to secure the signatures of enough persons who had previously signed membership cards that the Board would ordinarily exercise its discretion to order a representation vote if the change of heart of these employees was voluntary.

25. The evidence before us does not disclose, nor was it argued on behalf of the applicant, that the management of Chapleau Forest was involved in the origination, preparation or the circulation of the petition. However, Local 1-2995 argues that we should not find the petition to represent a voluntary expression of employee wishes having regard to certain evidence relating to the preparation and circulation of the petition, as well as what it alleges to be the lack of credibility of Ms. Pressé. The Board will review these arguments made on behalf of Local 1-2995 and the evidence that they relate to. Before doing so, it will be useful to review the approach the Board takes in deciding whether a petition represents a voluntary expression of employee wishes.

26. There is an onus on objecting employees to satisfy the Board on the balance of proba-

bilities that the petition filed in support of the application represents a voluntary expression of employee wishes. When assessing the voluntariness of a petition, the Board has regard to the overall environment in the workplace as well as the responsive nature of the employer-employee relationship. The Board will not give any weight to a petition where someone in a management capacity has been involved in the origination or circulation of a petition. But even if management is not involved, the Board will still give the petition no weight where the evidence demonstrates that the manner in which the document was prepared or circulated would lead reasonable employees to conclude that management was involved in the petition or might become aware of who did or did not sign the document. The impact on employee wishes is the same when management has a direct involvement or when employees simply perceive that management is involved.

27. Support for the preceding observations in a certification context can be found in the following two cases. In *Radio Shack*, [1978] OLRB Rep. Nov. 1043, the Board stated:

24. The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the "sudden change of heart" by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of desire which bears the signatures of employees who have also signed cards in support of the union. The Board's approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC 16,264 in the following terms:

In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate or impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd. and Canadian Paperworkers Union*, [1975] OLRB Rep. Nov. 813 and the cases cited therein.)

And in *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387, the Board made the following comments:

41. Actions by either the employees opposing the trade union or the employer can adversely affect the reliability of a statement of desire. Direct and open support by an employer will obviously suggest a relationship between the employer and the petitioners that would reasonably cause anxiety in the minds of employees approached by the petitioners. Therefore, in such circumstances, it would be just as reasonable to infer that the employees signed the document to conceal their support for the trade union as it would be to conclude that they signed voluntarily. Where this is the case, the Board usually takes the view that the petitioners have not satisfied the onus on them and the statement of desire is dismissed as an unreliable indicator of the true wishes of the employees. Similarly, actions by the petitioners without support of the employer

can equally destroy the reliability of a statement of desire. Circulating a document in the presence of foremen or representations clearly indicating support by the employer can produce the same anxiety in the minds of employees whose signatures are solicited and this prompt the Board to respond in a similar fashion.

28. In making its submissions, Local 1-2995 referred to a number of aspects of the evidence which it argued demonstrates that the conduct of Ms. Pressé and Mr. Routledge would cause reasonable employees to believe that management was supporting the petitioners or to believe that management would discover who did sign the petition. It also referred to some aspects of the evidence with a view to demonstrating that Mr. Routledge and particularly Ms. Pressé were not credible witnesses. Local 1-2995 relies on the cumulative effect of the evidence which we will refer to below.

29. There were some inconsistencies in the evidence of Ms. Pressé and Mr. Routledge with respect to who witnessed what signatures. Ms. Pressé was initially certain that she witnessed the signature of P15 but later indicated she was not so sure. She testified that she did witness the signature of P39 and that she did not witness the signature of P48. Mr. Routledge stated that he witnessed the signature of P15 and P39. He also testified that he did not witness the signature of P48. Local 1-2995 argues that we should infer from the inconsistencies, particularly when both say they did not witness the signature of P48, that someone else was involved in obtaining signatures contrary to the evidence of the petitioners.

30. While obtaining signatures, Ms. Pressé would occasionally drive a truck which her common-law husband had purchased from Chapleau Forest. Mr. R. Parent, her common-law husband, is a close friend of N. Lacente, a foreman with Chapleau Forest. Lacente and Parent often see each other socially, would hunt together, etc. When Ms. Pressé and Mr. Routledge were engaged in attempting to draft the preamble to the petition on July 19 in the lunchroom, they asked B. Legge if he could prepare the petition on his computer. There were a number of employees in the lunchroom at the time when B. Legge indicated he would prepare the petition on his computer. B. Legge is a bargaining unit employee whose brother is a foreman for Chapleau Forest.

31. J. Mitchell, a bargaining unit employee, testified that employees in the mill were afraid to lose their jobs and in order to protect their jobs employees signed the petition. When asked for the basis of this statement, J. Mitchell stated that an operator told him that he had to think of his job and that he could not take the chance of losing his job by not signing the petition.

32. J. Hoffman, another bargaining unit employee, testified concerning an event which he said occurred in July 1990. He went to speak to an employee by the name of St. Martin just after St. Martin had talked to N. Lacente and another bargaining unit employee. St. Martin told Hoffman that Lacente agreed with the suggestion that the Mill could close if a union was certified. St. Martin also told Hoffman that he would obtain a job then held by another employee when that employee was fired since he had signed a union card.

33. A review of the above arguments does not convince us that the circumstances referred to, even when viewed cumulatively, taints the petition. We are not prepared to infer that someone other than Mr. Routledge and Ms. Pressé circulated the petition as a result of their inconsistent evidence concerning a few signatures. The Board is satisfied that Mr. Routledge signed P15 and that the voluntariness of P39 and P48 has not been established due to a failure on the part of the petitioners to remember which one of them secured the signature. The evidence of the petitioners concerning the movement back and forth of the petition between them and where it was kept when neither had it in their possession convinces us that it would be inappropriate to infer that someone other than Mr. Routledge and Ms. Pressé circulated the petition.

34. The vehicle used by Ms. Pressé, Parent's relationship with Lacente and the incident with B. Legge in the lunchroom on July 19 are not matters which would affect the perception of reasonable employees. Mr. Parent was successful in a bid to purchase the truck approximately two years ago. The truck does not have the Employer's name on it. The connection between Ms. Pressé's driving of this truck and Chapleau Forest is so remote that it could not have an impact on reasonable employees. The Board has held that a relationship between an employee involved with the circulation of a petition and a member of management is a relevant factor in a petition inquiry and the weight to be given to such a factor depends on the facts in each case. (See *Otto's Deli*, [1980] OLRB Rep. Nov. 1673.) Although Mr. Parent has a close relationship with Mr. Lacente, there is no evidence to suggest that Mr. Parent played any role in the circulation of the petition. Some employees did hear B. Legge agree to prepare the petition on his computer. However, B. Legge was not involved with circulating the petition. The link between the petitioners and management through Parent and B. Legge is so indirect that the Board is satisfied that these circumstances would not have an inappropriate impact on the perception of reasonable employees.

35. The Board also finds it cannot give any weight to the evidence of J. Mitchell and J. Hoffman referred to above. For the most part, this evidence was hearsay in nature. J. Mitchell's evidence of what the operator said to him may reflect no more than a general concern during an organizing campaign, as opposed to concerns created by the improper conduct of an employer or petitioners. In addition to its hearsay nature, the evidence of J. Hoffman lacks precision as to time and there is no evidence that anyone other than three bargaining unit employees were aware of the incident.

36. The Board has determined that three other arguments made by Local 1-2995 do have merit. The first concerns the wording of the preamble on the petition and the letter to employees from Chapleau Forest dated July 19, 1990. The second relates to the precise manner in which the petition was circulated. The third concerns the evidence of Ms. Pressé and her credibility.

37. During Local 1-2995's campaign, E. Scheffers, the General Manager of Chapleau Forest, issued two letters to employees. The second of these is dated July 19, 1990 in which Mr. Scheffers indicates that he has received complaints from employees of harassment by union organizers to sign union membership cards. The preamble to the petition also makes reference to harassment by the union. The letters from Chapleau Forest to the employees do not contravene the Act and the reference to harassment by the union in the July 19 letter and the preamble to the petition does not demonstrate actual collusion between management and the petitioners. However, the reference to harassment by the union in both the company letter and the petition at approximately the same time may have given reasonable employees the perception that a link existed between management and the petitioners.

38. Of greater concern is the manner in which the petition was circulated. As noted earlier, the vast majority of the signatures on the petition were obtained on the premises of Chapleau Forest. Both Mr. Routledge and Ms. Pressé work in the planer building while it appears that a larger percentage of the employees work in the sawmill building. Both petitioners would have occasion to go into the sawmill building but Ms. Pressé agreed with the suggestion that the number of trips she made from the planer to the sawmill was very frequent to the point of being unusual during the period of time she circulated the petition. Ms. Pressé and Mr. Routledge both testified that they were not on working time when they approached employees on the Employer's premises to sign the petition. Mr. Routledge did approach some employees during work hours and asked them to sign the petition. Ms. Pressé indicated during her examination by the Board that she only approached employees during non-working hours, i.e., during their lunch period and breaks. There is evidence that both Mr. Routledge and Ms. Pressé were confronted on separate occasions

by P. Joffit, a foreman, while they were circulating the document in the sawmill. During the early evening, Mr. Routledge was asked by Mr. Joffit why he was in the sawmill. This discussion took place on the catwalk, an elevated area which could be easily observed by employees in the sawmill. After the discussion with the foreman, Mr. Routledge began to circulate the petition. On another occasion, Ms. Pressé was circulating the petition while Mr. Joffit was observing her activity on the catwalk. Mr. Joffit spoke with Ms. Pressé and asked her what she was doing. After telling him she was there to see an old friend, Ms. Pressé left the sawmill.

39. Petitioners who circulate their petitions on an employer's premises run the risk, depending on all of the circumstances, of having the Board conclude that the petition does not represent the voluntary wishes of employees. Management ultimately is in charge of the premises and employees are generally aware that management would prefer not to be unionized. These factors, along with the particular circumstances in a given case, could lead reasonable employees to believe that management is behind the petition or will discover who signed the petition if the petition is circulated on the employer's premises. In this case, Ms. Pressé conceded that she spent an unusual amount of time in the sawmill. The fact that Mr. Joffit confronted both petitioners on separate occasions to inquire why they were in the sawmill suggests that management monitored employees to a significant degree. Mr. Routledge approached some employees during their working hours and the evidence indicates that Ms. Pressé did on at least one occasion. Employees who have their work interrupted by a petitioner might reasonably believe that this could only occur if management supported the efforts of the petitioners. As noted above, Mr. Routledge spoke to Mr. Joffit and then circulated the petition while on another occasion Mr. Joffit observed Ms. Pressé circulating the petition. Although the evidence does not suggest that these contacts with the foreman were anything but innocent, reasonable employees who were in a position to observe them would be led to conclude that management and the petitioners had joined in an effort to oppose the certification of Local 1-2995. Given the sensitive nature of the employer-employee relationship, the way in which the petition was circulated as detailed above would likely lead reasonable employees to believe that management was involved in the petition exercise and that a failure to sign the petition would come to the attention of management.

40. Finally, the Board does have some concern with respect to the credibility of Ms. Pressé. As noted above, she testified on the first day of hearing that she did not approach employees to sign the petition while they were working. On the second day of hearing, at a time when Local 1-2995 had summonsed at least one witness who could challenge this aspect of her evidence, Ms. Pressé testified about one occasion in which she did approach employees when they were not on a break or at lunch, but while they were working. The Board is left to wonder whether there may have been other instances when Ms. Pressé approached employees while they were working. In addition, Ms. Pressé was asked in cross-examination why she decided not to approach employees while they were working and her response to the question did not answer it. This leaves the Board to speculate again as to why she chose to circulate the petition in the way she did. Since the onus in a petition case is on objecting employees, and since the objecting employees are the only ones who have knowledge about aspects of the origination, preparation and circulation of the petition, it is important for them to provide the Board with credible evidence. Ms. Pressé did not meet this obligation.

41. Having regard to the matters addressed in paragraphs 37, 38, 39 and 40, the Board cannot be satisfied that the petition filed in opposition to the certification of Local 1-2995 represents a voluntary expression of those employees who signed it. Accordingly, the Board can give it no weight.

42. The Board is satisfied on the basis of all the evidence before it that more than fifty-five

per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on August 7, 1990, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

43. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER W. H. WIGHTMAN; December 14, 1990

1. I found Rachel Pressé and Harold Routledge to be articulate, credible witnesses who, notwithstanding the absence of legal guidance, were able to persuade me that they represented people whose true feelings if not in opposition to the union are at least of the view that all employees should be entitled to express their wishes through a secret ballot vote.

2. The majority have denied the employees an opportunity to express their wishes through a vote on the basis of reasoning which involves drawing a long bow in order to conclude the petition was not voluntary. I would have found it to be voluntary and accordingly, I would have ordered a secret ballot vote as provided for in the legislation.

CONCURRING OPINION OF BOARD MEMBER RENE R. MONTAGUE; December 14, 1990

1. On numerous occasions, the members representing management in their dissents have expressed "their policy" that in all cases a representation vote should be held without regard to the evidence where unions have membership evidence in excess of 55%. This obstinacy in face of legislative mandate given to the Board to exercise its discretion is clearly unacceptable. "Their Policy" goes back to at least 1976, see New Strathcona Hotel (Toronto) Ltd. 1778-75-R; Rohynco Painting Contractors 1242-81-R; Schenker of Canada Limited 0077-82-R; Four Season's Hotel Toronto 0701-83-R just to name a few. I need quote only one of the dissenting opinions -Schenker of Canada Limited 0077-82-R at paragraph 2; "My concerns over the practice of eschewing the use of a secret ballot in preference to other indicia of employees wishes are perhaps equally well known and need not be repeated here". This policy and theme still prevails with the majority of the management representatives and has been reiterated yet again in Johnson Controls Ltd. [1990] OLRB Rep. June 1990. This consistently inflexible position in "Certifications" without regard to the evidence or the Legislation, is a regressive policy and does nothing for Labour Relations to-day or their role as adjudicators.

2. The *Ontario Labour Relations Act* section 7(2) reads as follows:

If the Board is satisfied that not less than 45 per cent and not more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall, and if the Board is satisfied that more than 55 per cent of such employees are members of the trade union, the Board *may* direct that a representation vote be taken.

[emphasis added]

3. Former Chairman George Adams, in his book *Canadian Labour Law*, summarized the issue of automatic certification as follows: "In Canada, documentary trade union membership evidence, serves as a labour board's primary barometer for the gauging of employee support for collective bargaining. In all the Canadian jurisdictions except British Columbia and Nova Scotia, labour boards need not resort to a representation vote if the applicant union can show documentary evidence that it has sufficient membership support in the proposed bargaining unit. In the interest of expedience, and to add a greater certainty to the certification process, collective bar-

gaining statutes have equated employee wishes with membership evidence, thus providing the boards with a practical alternative to the representation vote for assessing employee wishes. (355)"

4. The objectives of certification by membership evidence were enumerated by Professor and former B.C. Chairman Paul Weiler in his book *Reconcilable Differences*. The objectives were to facilitate employee choice of collective bargaining, to minimise conflict from the employer's wielding economic power, and to safeguard future relationships between the union and the employer from being poisoned by charges and anti-charges during the election. With specific regard to the election period, Professor Weiler stated "...the labour relations version of the Margesson of Queensbury Rules tend to be ignored by employers..." This Board has had ample opportunity to comment on the Board's discretion to order a representation vote when the union satisfies the Board that more than 55% of the employees are members of the union.

5. In *Cleveland-CAE Metal Abrasive Limited* [1979] OLRB Rep. Feb. 81, the Board stated:

The majority principle is a cornerstone of the labour relations system which operates in this jurisdiction. The Board confers bargaining rights covering all of the employees in the bargaining unit found appropriate for collective bargaining when satisfied that the applicant trade union represents the majority of the employees. Having regard to the principle of majoritarianism as rooted in the Act, it is the practice of the Board to certify without a vote when satisfied that membership evidence within the meaning of the Act has been submitted on behalf of more than 55% of the employees in the unit.

6. In *Baltimore Aircoil Intra-American Corporation* [1982] OLRB Rep. Oct. 1387 at para. 49, chairman George Adams stated that to order votes as a general matter would be to "...ignore the emphasis the statute places on membership cards as the method of determining the employees' wishes where this support is in excess of 55%".

7. The current Chair of the Board, Mr. Mitchnick, has also stated the preference of the Board for certification without representation vote when the Board is satisfied of the membership evidence. In *Walbar Canada Limited* [1982] OLRB Rep. Nov. 1734, the Board stated at paragraph 17:

The scheme of the Act in place in this province clearly establishes that, as a starting point, evidence of membership in excess of 55% of the bargaining unit *will normally entitle* an applicant to certification without the additional step of a representation vote... The discretion entrusted to the Board under section 7(2) is an important safeguard for employee wishes, but the Board has always made it clear that it will be exercised only for *compelling reasons and on the basis of cogent evidence*.

[emphasis added]

8. Anyone doubting the approach of the Board to the issue of certification when more than 55% of the employees are members of a trade union should carefully examine *D.E. Winter Plumbing and Heating Ltd.* [1987] OLRB Rep. Oct. 1228:

The object in certification proceedings is to determine whether a majority of employees found by the Board to be appropriate for collective bargaining wish to be represented by the applicant trade union in their employment dealings with their employer. The *Labour Relations Act* provides that the certification of trade unions in the province is based primarily upon assessment of the trade union's membership support as evidence by membership records filed in support of an application. ...In Ontario, as in most Canadian jurisdictions, *the representation vote exists as a residual mechanism* for ascertaining the wishes of bargaining unit employees in cases where either the applicant union does not have the support of more than 55% of the bargaining unit employees which is necessary for outright certification of section 7(2) of the Act... or where the

circumstances are such that the Board sees fit to require a vote to be held notwithstanding that there is documentary evidence showing membership in excess of 55%. The Board's discretion in that respect must be exercised in a manner that is consistent with the *legislated primacy of the membership evidence as the means by which employee wishes with respect to certification are ascertained.*

[emphasis added]

9. Anyone familiar with the basics of administrative law knows that a tribunal which is given discretion cannot fetter that discretion by adopting a fixed rule of policy which does not allow the tribunal to exercise that discretion. Arbitrary insistence upon a representation vote when membership evidence is in excess of 55%, is in my view an attempt to fetter the discretion which was granted by the Legislature to the Board under section 7(2).

10. By insisting upon a representation vote in all circumstances, management members are seeking to commit the Board to an impractical, costly and time consuming procedure which the Legislature has determined is not appropriate when membership evidence is satisfactory to the Board. There is no logical reason for this Board to ignore its legislative mandate and its previous decisions when exercising its discretion to direct that a representation vote be taken. Board Members representative of management should remind themselves that when the union has satisfied the Board that more than 55% of the employees are members of the trade union that such union is "normally entitled" to certification, that a representation vote is a "residual mechanism" and that the Board will only exercise its discretion to order a representation vote "for compelling reasons and on the basis of cogent evidence". Advocacy in favour of representation votes regardless of the circumstances is in conflict with both the language of the *Labour Relations Act* and in the decisions of the Ontario Labour Relations Board. I believe it is not a Board member's role to alter the legislation to read what he or she would like it to, but to work within the framework of the legislation.

3116-88-G International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 721, Applicant v. Cosnaut Steel Inc., Respondent

Certification - Natural Justice - Practice and Procedure - Reconsideration - Employer arguing it received no notice of hearing - Employer failing to rebut statutory presumption that notice sent by mail was received - Application for reconsideration dismissed

BEFORE: Inge M. Stamp, Vice-Chair, and Board Members W. N. Fraser and J. Redshaw.

APPEARANCES: Sherry Liang and Gary White for the applicant; Carl Peterson and John Zivanic for the respondent.

DECISION OF THE BOARD; December 6, 1990

1. A hearing was scheduled in this matter to deal with the issue of notice raised by counsel for the respondent's letters dated July 31, 1990 and August 31, 1990. The July 31 letter reads in part:

On behalf of our client we are asking the Board to reconsider the decision on the basis that Cosnaut Steel Inc. did not receive notice of the hearing which took place and gave rise to the Board's decision on July 23, 1990. Therefore, we would ask that the Board schedule another day

of hearing in order to give the Respondent an opportunity to present its case in connection with the damages payable. It will be the position of the Respondent that the \$11,755.16 claimed by the Respondent are unwarranted.

At the beginning of this hearing the parties agreed to the substitution of Board Member W. N. Fraser for Board Member W. Gibson.

2. The original hearing in this matter resulted in the Board (differently constituted) finding in paragraph 9 of its decision dated October 31, 1989:

9. Having regard to the evidence and the submissions of the parties, the Board finds that the employer is bound to the collective agreement between the Ontario Erectors Association, Incorporated and The Ontario Erectors Association and The International Association of Bridge, Structural and Ornamental Ironworkers and The Ironworkers District Council of Ontario comprised of Local Unions 700, 721, 736, 759, 765 and 786 effective from May 1, 1988 to April 30, 1990. The Board further finds that the employer has violated the collective agreement and the respondent is directed to pay damages to the Union for the unpaid wages and contributions for those hours for which John Lemire was paid at a rate of \$17.00. This panel will remain seized in the event that the parties are unable to agree on the quantum of damages.

The decision indicated that Mr. K. Glogowski appeared on behalf of the respondent. The decision was mailed to the attention of Mr. Glogowski.

3. The parties were unable to agree on the amount of damages and at the request of the applicant a further hearing was scheduled to take place on April 24, 1990. This date was adjourned on agreement of the parties due to the unavailability of one of the applicant's representatives. The matter was rescheduled to take place July 13, 1990.

4. All the Board's correspondence, notices of hearings, an the cancellation of the hearing scheduled for April 24, 1990, were sent to Mr. K. Glogowski, Cosnaut Steel Inc., 70 Avenue Boulevard, Unit 12, Bramalea, Ontario L6T 4S7. None of the notices or letters were returned to the Board.

5. On July 26, 1990 the Registrar sent the Board's second decision in this matter dated July 23, 1990 to the respondent addressed to the attention of Mr. K. Glogowski. The decision indicates that no one appeared on behalf of the respondent.

6. On July 31, 1990 counsel for the respondent advised the Board of the position of the respondent and asking the Board to reconsider its decision dated July 23, 1990.

7. Mr. John Zivanovic testified that he was the sole owner of Cosnaut Steel Inc. He told the Board that he has no secretary and opens all the mail for Cosnaut including mail addressed to the attention of Mr. Glogowski. Mr. Zivanovic stated he did not receive notice of the hearing scheduled for July 13, 1990 and if he had received notice he would have attended. He had intended to go to the earlier scheduled hearing which was adjourned on agreement, at the request of the applicant.

8. Mr. Zivanovic testified that Mr. K. Glogowski worked for him as a draftsman until he opened his own company, Pacific Steel. It was Mr. Zivanovic's evidence that he did not have the time and sent Mr. Glogowski to the "meeting" at the Ontario Labour Relations Board. When asked if Mr. Glogowski was working for him at the time, Mr. Zivanovic said "no he was using my facilities and he went on my behalf".

9. The only issue before us is whether the respondent had notice of the July 13, 1990 hearing. Section 113(1) of the Act states:

113.-(1) For the purposes of this Act and of any proceeding taken under it, any notice or communication sent through Her Majesty's mails shall be presumed, unless the contrary is proved, to have been received by the addressee in the ordinary course of mail.

10. Having considered all of the evidence, including the evidence of Mr. Zivanovic, and the submissions of the parties, we are not satisfied that the respondent has proved "the contrary", that is, that the notice was not in fact received. This grievance has been ongoing for over one year. There have been numerous pieces of correspondence sent to the respondent. All of the pieces of correspondence including two Board decisions, and notice regarding the cancellation and rescheduling of hearings were sent to Cosnaut, to the attention of Mr. Glogowski. There has been no notice to the Board that he was not the representative of the respondent for the purposes of this proceeding. Mr. Glogowski was not called to testify with respect to his knowledge of the notice for the July 13, 1990 hearing.

11. Having regard to all of the circumstances in this case, the Board is not prepared to grant the respondent's request that the Board re-hear the issue of damages.

1368-90-R International Brotherhood of Electrical Workers, Local 353, Applicant v. Delta Electric Eastern Limited, Delta Electrical & Mechanical Inc., Delta Electrical & Mechanical Limited and Delta Electric Ltd., Respondents

Construction Industry - Evidence - Related Employer - Sale of a Business - No one appearing for respondent companies at hearing - Act requiring respondent to adduce all material facts relevant to application, but not altering legal burden of proof - Where applicant union chooses to proceed in absence of respondents rather than enforce attendance, union must still adduce some evidence to support findings necessary to successful application - Absence of information peculiarly within knowledge of respondents should not stand in way of success - Board assessing evidence accordingly - Declaration issuing

BEFORE: *Owen V. Gray, Vice-Chair, and Board Members W. Gibson and C. A. Ballantine.*

APPEARANCES: *Murray Gold, Bob Gill and Richard Lyman* for the applicant; no one appearing for the respondents.

DECISION OF THE BOARD; November 28, 1990

1. This is an application under section 63 and subsection 1(4) of the *Labour Relations Act* ("the Act"). The applicant alleges that there has been a sale of business among the respondents and that they engage in associated or related businesses or activities operated under common control and direction in circumstances in which they should be declared to constitute a single employer for the purposes of the Act. As filed, the application shows four names in the list of respondents in the title of the proceeding. As will become apparent, there appear only to be two corporate entities of importance here: Delta Electrical & Mechanical Limited (which will sometimes be referred

to herein as "DEM Limited") and Delta Electrical & Mechanical Inc. (sometimes hereafter referred to as "DEM Inc.").

2. Various attempts were made to give the respondents notice of these proceedings. At a point when it was not clear whether the initial such attempts had been successful, we issued an order in which the respondents were specifically directed to comply with subsections 1(5) and 63(13) of the *Labour Relations Act*, which provide as follows:

1.-(5) Where, in an application made pursuant to subsection (4), it is alleged that more than one corporation, individual, firm, syndicate or association or any combination thereof are or were under common control or direction, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

63.-(13) Where, on an application under this section, a trade union alleges that the sale of a business has occurred, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

In addition to directing compliance with the requirement that some person(s) attend the next scheduled hearing to give the requisite oral evidence, we also directed that each respondent produce at that hearing all documents in its possession, custody or power relevant to the matters in issue. We refer later in this decision to the means by which notice of these proceedings, that decision and the scheduled hearing were given to the affected respondents. At this point, we simply note that when the matter came on for hearing on November 15, 1990, notices sent to apparently appropriate addresses had not been returned and we felt comfortable concluding, in the absence of evidence to the contrary, that the affected respondents had notice. No one appeared at that hearing on behalf of any of those respondents, nor did any of them comply in any way with our earlier direction.

3. It is in the nature of proceeding of this type that most of the relevant facts are uniquely within the knowledge of the respondents. Before subsections 1(5) and 63(13) were added to the Act, decisions of the Board regularly observed that the applicant had to introduce some evidence to support the underlying factual assertion that a transaction or relationship of the sort contemplated by section 63 or subsection 1(4) had taken place or existed. The decisions often observed that applicants could summons officers of the respondent corporations to give evidence with respect to the relevant facts if that was necessary in order to put some such evidence before the Board. In those decisions the Board also observed, however, that very little evidence might be required to satisfy the evidentiary burden on a trade union applicant when the relevant facts were largely, if not exclusively, within the knowledge of the respondent employers: *Woodway Structural Components*, [1971] OLRB Rep. Aug. 545; and see *Beaver Engineering Ltd.*, [1973] OLRB Rep. Jan. 57. Subsections 1(5) and 63(13) of the Act now impose a burden of adducing evidence on respondent employers but do not expressly alter the legal burden of proof. Where an applicant trade union chooses, as this one did, to proceed with the application in the absence of the respondent employers, rather than enforce compliance with the statutory burden and our confirming order, it appears to us that the applicant still must adduce some evidence to support the findings necessary for the application to succeed. The obvious intent of subsections 1(5) and 63(13), however was that the absence of information peculiarly within the knowledge of the respondent should not stand in the way of success. We have taken that intent into account assessing the weight be given to the evidence the applicant was able to provide in these circumstances.

4. The applicant's evidence was that, on October 22, 1987, a man named Werner Kasper signed a voluntary recognition agreement on behalf of an electrical contractor he described as "Delta Electric Manitoba Ltd." By that agreement, the contractor agreed to be bound by the terms of the then existing provincial collective agreement governing the employment of electricians

and electricians' apprentices in the industrial, commercial and institutional sector of the construction industry. Counsel for the applicant advised us that the relevant Ontario authorities have no record of a corporation of that name having been incorporated in Ontario or registered to carry on business in Ontario. Indeed, he said that searches he had caused to be performed in Manitoba in connection with these proceedings failed to disclose the existence of a corporation by that name in that province either.

5. Certified copies of records of the Companies Branch of the Ministry of Consumer and Commercial Relations of the Province of Ontario disclose that, as of October 22, 1987, the words "Delta Electric" appeared in the names of two corporations carrying on business in Ontario. One of those was Delta Electric Ltd., a corporation incorporated under the laws of the Province of Manitoba. An initial notice filed under the Corporations Information Act on behalf of that corporation on October 28, 1987 described it as having commenced business in Ontario on October 26, 1987 and identified Werner E. Kasper as its Director and agent for service in Ontario, with an office address down the street from the project in connection with which Mr. Kasper had signed the voluntary recognition agreement. The other corporation was "Delta Electric Eastern Limited", an Ontario corporation incorporated on October 6, 1987. According to that corporation's filings, Werner Kasper became its sole director and officer on November 17, 1987 after it had been incorporated by another individual, presumably his solicitor.

6. It was the applicant's evidence that the "Delta Electric" with which it dealt following the voluntary recognition abided by the relevant collective agreement and, pursuant to that collective agreement, made the appropriate contributions to the applicant's welfare trust fund on behalf of the various union members whom it employed from time to time. These contributions were accompanied by the customary contribution reports, which would be sent to the employer each month by the applicant's benefits administrator. The applicant provided us with copies of the reports returned by the employer commencing in February 1989. It would appear from those reports that at sometime between October 1987 and February 1989 the benefits administrator had begun addressing the "Delta Electric" Company as "Delta Electric East Ltd." and that the "Delta Electric" known to the union was content to be so described.

7. Certified copies of documents from the records of the Companies Branch show that, by Articles of Amendment effective April 5, 1989, Delta Electric Eastern Limited changed its name to Delta Electrical & Mechanical Limited. The Articles of Amendment are signed by Werner Kasper as President. The union's benefits administrator continued to send employer contribution reports to "Delta Electric East Ltd." for completion. We note that the reports returned to the union for the period April 1 to April 30, 1990, bear a "received" stamp with the name "Delta Electrical & Mechanical Ltd." on it.

8. The applicant provided us with the *viva voce* evidence of an electrician who was the general foreman for the company known to the union as "Delta Electric" at the terminal 3 Hotel project at the Toronto International Airport between sometime in January, 1990 and April 1, 1990. We are satisfied by his evidence that Werner Kasper was actively involved in the management of the "Delta Electric" company known to the union during that time period. The witness left that job on April 1, 1990 over disagreements about the company's management of the work. He testified that at that time the work for which "Delta Electric" was responsible was perhaps 20 per cent complete.

9. Certified copies of documents in the records of the Companies Branch show that Werner Kasper was the sole director and officer of 874961 Ontario Limited as of March 22, 1990. This numbered company had been incorporated on December 28, 1989 by a lawyer at a law firm whose

office address remained the head office address of the corporation. That is the last information return filed by any of the corporate respondents. By Articles of Amendment signed by Werner Kasper on March 22, 1990 and filed March 28, 1990, that numbered company changed its name to "Delta Electrical & Mechanical Inc.".

10. In response to an inquiry they had made, on May 25, 1990 the applicant's solicitors received a facsimile transmission from a law firm in Vancouver confirming that the latter represented an insurance company which had issued labour and material payment bonds with respect to "Delta Electrical Projects", one of which was "Terminal 3, Lester B. Pearson International Airport, Hotel electrical work." Copies of the bonds were included in the transmission. From those documents it appears that a labour and material bond was issued in December 1989 with respect to obligations of "Delta Electrical & Mechanical Ltd." under a contract with the Foundation Company of Canada Limited and others for the performance of "Terminal 3, Lester B. Pearson International Airport, Hotel electrical work." Attached to that bond is a document entitled "Modification Number 1" by which "it is understood and agreed that the name of the principal is amended to read: Delta Electrical & Mechanical Inc." This document is dated April 3, 1990 and is executed by the Foundation Company of Canada Limited and by the insurance company which issued the bond, as well as by Werner Kasper on behalf of both Delta Electrical & Mechanical Ltd. and Delta Electrical & Mechanical Inc. Counsel for the applicant has asked us to treat these documents as evidence that there was a transaction of some sort between DEM Limited and DEM Inc. and others, by which DEM Inc. took over the benefit and burden of DEM Limited's then uncompleted contract for the performance of Hotel electrical work at Terminal 3. Having regard to the observations we made in paragraph 3 above, we accept those documents as slight but satisfactory evidence of that proposition.

11. Grievances filed by the applicant against the company it then still knew as "Delta Electric Eastern" were referred to the Board under section 124 on two occasions earlier this year. On the first of those two occasions, Mr. Kasper signed a memorandum of agreement by which "Delta Electric Eastern" acknowledged that it was bound by and in default under the electricians provincial collective agreement in the ICI sector. The Board's file with respect to that proceeding shows that the respondent to it was represented by a solicitor from the law firm whose office address was and remains the registered head office address of DEM Inc. As we have already observed, Delta Electric Eastern was no longer the corporate name of any of Mr. Kasper's corporations at that point in time. We are advised that the records of the Companies Branch show no registration of "Delta Electric Eastern" as a style under which any entity carries on business.

12. Notices of this application and of the hearing scheduled for November 15, 1990 and of our earlier order and direction to the respondents were all sent by mail to several addresses. Mail sent to some of those addresses was returned undelivered. The information return referred to in paragraph 9 above shows an address on The Kingsway in Toronto as Mr. Kasper's residence address. Mail sent to the Kingsway address was not returned undelivered, nor was mail sent to the law firm whose address is shown on that return as the head office address of what shortly thereafter became known as Delta Electrical & Mechanical Inc.

13. On the basis of the foregoing, we find that DEM Limited was at all material times bound by the provisions of the provincial collective agreement between The Electrical Bargaining Agency of the Electrical Association of Ontario and the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario. We further find that associated or related activities or businesses were carried on, whether or not simultaneously, by or through DEM Inc. and DEM Limited under the common control or direction of Werner Kasper. We further find that there was a sale of all or part of the business of DEM Limited to DEM Inc. on or

before April 3, 1990. In all the circumstances, we declare that the corporations now known as Delta Electrical & Mechanical Limited and Delta Electrical & Mechanical Inc. constitute, and have since December 28, 1989 constituted, a single employer for the purposes of the *Labour Relations Act* which was and is bound by the provisions of the aforementioned provincial collective agreement.

1682-89-M; 1683-89-JD **E. H. Price Limited**, Applicant v. Sheet Metal Workers' International Association Local Union No. 47, Sheet Metal Workers' International Association, Ontario Sheet Metal Workers' Conference, Respondents v. United Steelworkers of America and United Steelworkers of America, Local 8990, Intervener; **E. H. Price Limited**, Complainant v. Sheet Metal Workers' International Association Local Union No. 47, Sheet Metal Workers' International Association, Ontario Sheet Metal Workers' Conference, Respondents v. United Steelworkers of America, United Steelworkers of America, Local 8990, Ontario Sheet Metal and Air Handling Group and Megatech Contracting Limited, Interveners

Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Union grieving employer's subcontracting of work to complainant - Complainant bringing application under jurisdictional dispute provisions - Complainant requesting Board direction that union cease requiring employer to refrain from purchasing from complainant - Board having no jurisdiction to deal with complaint under jurisdictional dispute provisions

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*.

APPEARANCES: *Bernard Fishbein, Ross Mitchell* and *R. Belleville* for Sheet Metal Workers' International Association, Local 47 and Sheet Metal Workers' International Association, Ontario Sheet Metal Workers' Conference; *Michael Gottheil* for United Steelworkers of America; *Keith Billings* and *L. Cianfarani* for Ontario Sheet Metal and Air Handling Group and Megatech Contracting Limited; *Philip R. Matthews* for E. H. Price Limited.

DECISION OF THE BOARD; December 20, 1990

1. The application in File No. 1682-89-M is an application made under section 150 of the *Labour Relations Act* for a determination by the Board of a question whether certain work performed or to be performed is within the industrial, commercial and institutional sector (hereafter "the ICI sector") of the construction industry. The complaint in File No. 1683-89-JD is a request for direction under section 91 of the Act with respect to an alleged work assignment dispute. They were filed together by the applicant/complainant. For convenience, the Board will refer to the applicant/complainant as "Price", to the respondents collectively as "the Sheet Metal Workers", to Sheet Metal Workers' International Association Local Union No. 47 as "Local 47", to the interveners United Steelworkers of America and United Steelworkers of America, Local 8990 collectively as "the Steelworkers", to United Steelworkers of America, Local 8990 as "Local 8990", to the intervener Ontario Sheet Metal and Air Handling Group as "the Group" and to the intervener Megatech Contracting Limited as "Megatech".

2. Counsel for the Group and Megatech appeared at the hearing scheduled for the complaint and filed an intervention in Form 83. The Group and Megatech were made parties to the complaint.

3. The complaint was listed for hearing to deal with an issue of whether the Board had jurisdiction under subsection 91(1) of the *Labour Relations Act* to entertain the complaint. The issue was raised by the solicitors for the Sheet Metal Workers. The letter submitted that the Board was without jurisdiction to entertain the complaint because there was no "jurisdictional dispute" within the meaning of the Act. The letter submitted further that the issue be determined before the Board processed the complaint any further or scheduled any pre-hearing conference into the complaint.

4. The letter also addressed the section 150 application. The Sheet Metal Workers took the position that the applicant was without standing to make the application and the Board was without jurisdiction to grant the relief sought in the application. The Sheet Metal Workers submitted that the issue of the complainant's standing to bring a section 150 application and the Board's jurisdiction to grant the relief sought in the application should be determined by the Board before it processed the application any further. As already noted, the Board listed the complaint for hearing on the issue of its jurisdiction to entertain the complaint. The section 150 application was not listed for hearing.

5. At the hearing into the complaint, counsel for Price, supported by counsel for all of the interveners took the position that this panel of the Board could not and should not proceed with any aspect of the section 91 complaint until the question raised by the application under section 150 of the Act had been answered. That question is whether the work in dispute in the complaint is within the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) of the Act. Section 150 states:

150. The Board shall, upon the application of a trade union, a council of trade unions, or an employer or employers' organization, determine any question that arises as to whether work performed or to be performed by employees is within the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e).

The Board received the parties' submissions on whether it could and ought to proceed with the section 91 complaint, including the issue of the Board's jurisdiction to entertain that complaint, before a determination had been made in the section 150 application. The Board adjourned to consider the submissions and then issued the following oral ruling:

The Board will not defer the hearing into the issue of whether it has jurisdiction under subsection 91(1) of the *Labour Relations Act* to entertain this complaint in order to allow an inquiry under section 150 of the Act. Written reasons for its ruling will be issued later.

6. The complaint under section 91 of the Act was made because Local 47 had referred a grievance under section 124 of the Act for final and binding arbitration. The grievance alleges that Megatech was violating the Sheet Metal Workers' provincial agreement ("the Agreement") to which it and Local 47 are bound by purchasing manufactured sheet metal parts from Price. The complaint refers to the parts as "diffusers". They are being manufactured at Price's plant in the Province of Quebec and they are for installation in an office building being built on a construction site in the City of Ottawa. Price alleges that Local 47's grievance constitutes a demand that Price assign the work of manufacturing the diffusers to an employer employing Local 47 members instead of to Price's employees who are represented in collective bargaining with Price by Local 8990. Price claims that the work in dispute is not work in the construction industry and is not work covered by the Agreement on which Local 47 relies. It is implicit in Price's claim that the Agree-

ment applies only to work in the industrial, commercial and institutional ("ICI") sector of the construction industry in the Province of Ontario and, therefore, cannot apply to the work which is the subject matter of the complaint.

7. The thrust of the submissions on behalf of Price, as the Board understands them, is that, since Local 47's claim to the work is based on a collective agreement which applies only in the ICI sector of the construction industry in the Province of Ontario, the Board should conduct an inquiry under section 150 of the Act in order to determine whether the work in dispute in the complaint is in that sector. The interveners concur in Price's position and submit further that the Board ought to make the sector determination in order for the parties to understand the full scope of the section 91 complaint. Counsel for Megatech and the Group takes the further position that Local 47's grievance is an attempt to extend the application of the Agreement to work which Megatech and the Group claim is outside the ICI sector. Therefore, counsel submits, the grievance raises a question to be decided under section 150 as to whether the work involved is work in the ICI sector. Section 150 of the Act mandates that the Board determine that question, according to counsel.

8. While Price filed its section 150 application concurrently with the section 91 complaint, the hearing scheduled into the section 91 complaint was for the purpose of determining whether the Board has jurisdiction under subsection 91(1) of the Act to inquire into the complaint. Assuming, without finding, that the complaint does raise a question "...as to whether work performed or to be performed by employees is within the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e)." of the Act, and assuming that section 150 mandates that the Board determine the question, the Board has the power under subsection 102(13) of the Act to determine its own practice and procedure, subject to the parties having the full opportunity to present their evidence and make their submissions. That power includes the power to decide at what stage of a particular proceeding the Board will determine the question raised by an application under section 150 of the Act. In the complaint at hand, the Sheet Metal Workers have taken the position that the Board has no jurisdiction under subsection 91(1) of the Act to inquire into the complaint. If they are correct, the complaint will be dismissed. Therefore, even if the complaint raises a question of whether the work in dispute is work in the ICI sector of the construction industry in Ontario, it would become academic insofar as the section 91 complaint was concerned. On the other hand, if the Board finds that it has jurisdiction to inquire into the complaint, it will have to decide at that time how to proceed, if at all, with the section 150 application.

9. These are the Board's reasons for its oral ruling and it will turn now to deal with the issue of its jurisdiction to entertain the complaint made under section 91 of the Act. Paragraph 4 of the complaint describes the work in dispute as follows:

The manufacturing at Complainant's plant at 801 Price, Parc Industriel, St-Jerome, Quebec, of TBD 4150 diffusers to be installed on construction job site of the Queensway Centre - Commerce Plaza Preston Street at the Queensway, Ottawa, Ontario, by members of [Local 47] employed by Megatech Contracting Limited.

The work has been assigned to Price's employees at its plants. Price contends that the Sheet Metal Workers are requiring Megatech "...to assign the off-job site manufacture of the TBD 4150 diffusers to members of the Sheet Metal Workers under the 'Sheet Metal label' rather than to the complainant's employees, members of Local 8990.". The remedy sought by Price is a Board direction that:

The Sheet Metal Workers cease and desist from requiring Megatech or any other members of the employers' association to refrain from purchasing manufactured items from the complainant on the sole grounds that they were not made by members of the Sheet Metal Workers or any

affiliated local of the Sheet Metal Workers' International Association under the "Sheet Metal label".

10. For purposes of this motion, the Sheet Metal Workers agree to the following facts asserted in the complaint:

- (a) the manufacturing of the diffusers in dispute has been carried on at the complainant's plant for approximately ten years;
- (b) the diffusers are catalogue items meeting specific pre-determined standards;
- (c) the diffusers cannot be manufactured on the job site; and,
- (d) Local 47 has filed a grievance with Megatech claiming jurisdiction over the type of work performed by the complainant.

The other parties did not dispute these facts.

11. Subsection 91(1) of the *Labour Relations Act* provides as follows:

91.-(1) The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.

Therefore, in order for the Board to have jurisdiction to entertain a complaint under section 91, the complaint must be either:

- (1) a complaint that "...a trade union..., or an officer, official or agent of a trade union...was or is requiring an employer...to assign particular work to persons in a particular trade union, or in a particular trade, craft or class rather than to persons in another trade union or another trade, craft or class,..."; or,
- (2) a complaint "...that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union,...".

Since this complaint is brought by the employer who has control over the work described in the complaint as being the work in dispute, the complaint must satisfy the first condition if the Board is to have jurisdiction to entertain it. Counsel for the Sheet Metal Workers argues that the complaint on its face and on the admitted facts does not satisfy that condition because the complainant Price is the employer who is assigning the work and Local 47 has neither gone to it directly and demanded that the work be assigned to the Sheet Metal Workers' members nor done so through Megatech as its agent. The other parties argue that, on the facts, the Board can and ought to conclude that Local 47, by means of its grievance alleging that Megatech has violated the subcontracting provisions of the Agreement, is using Megatech as its agent to require the complainant to assign the work to members of the Sheet Metal Workers instead of the Steelworkers or in the alter-

native, that the grievance reveals a jurisdiction dispute between the Sheet Metal Workers and the Steelworkers about which union's members should perform that work. Therefore, the grievance should be seen as the vehicle by which Local 47 is requiring Price to assign the work to members of the Sheet Metal Workers instead of the Steelworkers.

12. Counsel for the Sheet Metal Workers argues that the Board lacks jurisdiction to entertain this complaint because the Sheet Metal Workers are not requiring the complainant to assign the work of manufacturing the diffusers to members of the Sheet Metal Workers rather than to Price's employees who are members of Local 8990. All the Sheet Metal Workers have done, according to counsel, is to raise a grievance against Megatech alleging that its purchase of diffusers not manufactured by sheet metal workers under the Sheet Metal Workers' label for installation by members of the Sheet Metal Workers employed by Megatech on an ICI project in the City of Ottawa violates the Agreement. Counsel contends that the Board's jurisprudence under section 91 makes it clear that a subcontracting grievance against an employer who is not the employer of the employees to whom the work in dispute has been assigned is not a demand for that work within the meaning of section 91 of the Act. In support of that proposition, counsel relies on *Napev Construction Ltd.*, [1980] OLRB Rep. Feb. 247; *Harold R. Stark Company Limited*, [1982] OLRB Rep. Feb. 222, application for reconsideration dismissed [1982] OLRB Rep. Apr. 576 and *Four Seasons Drywall Systems and Acoustics Limited*, [1989] OLRB Rep. June 599.

13. The thrust of the argument of Price's counsel is that, in answering the question of whether the Board has jurisdiction under subsection 91(1) of the Act to entertain this complaint, the question to be answered by the Board is whether the Sheet Metal Workers are ordering an agent, Megatech, to refrain from purchasing diffusers manufactured by the complainant because of the affiliation of the complainant's employees with Local 8990 and, in effect, requiring that the manufacturing of the diffusers be done by members of the Sheet Metal Workers. That question should not be answered, according to counsel, in a manner which would permit one trade union to effectively boycott another one in order to limit the manufacturers in a given field to ones which were approved by the first trade union. Section 91 is in the Act to prevent that sort of result. Counsel contends that one of the things which makes the instant case different from others which the Board has dealt with under section 91 is the fact that it involves a demand for the assignment of the work by a construction trade union, through a construction employer against a manufacturer and, to date, the Board has applied subsection 91(1) without having examined the link between the manufacturing industry and the construction industry.

14. The argument of counsel for the Steelworkers runs as follows. The dispute underlining this complaint goes beyond a subcontracting grievance between Local 47 and Megatech because, if Local 47 succeeds in its grievance, a collateral representation issue would be raised. This is because Price's employees would be laid off as a result of its loss of business. That, in turn, could cause those employees to conclude that they should be represented by the Sheet Metal Workers instead of the Steelworkers in order to keep their jobs. That would be a matter of significant labour relations interest to the Steelworkers. If that is not sufficient by itself to provide a sound labour relations reason for hearing the complaint, the consequences of that result for employees' freedom to choose the trade union which will represent them is reason for the Board to entertain the complaint. Although there are no facts of this before the Board, counsel submits that the Sheet Metal Workers have attempted to have this type of manufacturing work done by its members rather than members of the Steelworkers for at least the past five years. Therefore, the Board should not dismiss the complaint on what counsel refers to as a technicality in a preliminary motion. Rather, the Board should hear all of the parties on all of the issues so that it can make a determination which is final and binding on all of the parties. According to counsel, section 91 of the Act is broad enough to encompass the circumstances of this case and, in view of the Sheet Metal Workers' claim that

the Steelworkers and Price have no standing in the arbitration of its grievance against Megatech, there is nowhere else where they can go to resolve the dispute if the Board does not read subsection 91(1) of the Act broadly enough to give it jurisdiction to entertain the complaint. In that respect, counsel submits that the Legislature must have intended section 91 to empower the Board to resolve disputes such as this one. Finally, counsel argues that Local 47, by trying to have the complaint dismissed without a hearing on its merits, is seeking to prevent the Steelworkers and Price from making submissions on a matter which has both economic and labour relations consequences for them and is seeking to avoid a full airing of a dispute which has gone on for five years. Therefore, in the interests of good labour relations at least, there should be a full hearing into the complaint. Counsel contends that it is improper for Local 47 to attempt to narrow the issue to a subcontracting dispute when it is much more than that because of its collateral economic and labour relations content.

15. Counsel for Megatech and the Group endorses the arguments of counsel for Price and counsel for the Steelworkers. He agrees particularly with the proposition that this case is entirely different on its facts from the Board decisions on which counsel for the Sheet Metal Workers relies because it deals with a jurisdictional dispute between Local 47 and the Steelworkers about who will manufacture diffusers. In other words, as between Local 47 and the Steelworkers, there is an issue of whose work it is to manufacture diffusers, the members of the Sheet Metal Workers or members of the Steelworkers. Counsel contends that the Legislature put section 91 in the Act in order to deal with that very kind of issue.

16. Counsel for Megatech and the Group argues further that, on the facts before the Board, Megatech can be seen as the agent of the Sheet Metal Workers in that Local 47, by its grievance, is requiring Megatech to purchase diffusers manufactured by members of the Sheet Metal Workers and no one else. According to counsel, that would be the effect of granting Local 47's request for a declaration that Megatech contract for the supply of diffusers only with manufacturers who are in a collective bargaining relationship with the Sheet Metal Workers. That is what makes Local 47's grievance against Megatech a requirement that the complainant assign the work of manufacturing diffusers to members of the Sheet Metal Workers instead of to members of the Steelworkers and counsel contends, that is what this case is all about. Therefore, viewed from that perspective, counsel submits that the Board ought to entertain the complaint and exercise its jurisdiction to direct what action, if any, the complainant, Megatech or any of the trade unions should take or refrain from taking with respect to the assignment of the work of manufacturing diffusers.

17. The Board disagrees with counsel for Price and the interveners that the Sheet Metal Workers have, by their grievance against Megatech, made Megatech their agent within the meaning of subsection 91(1) of the Act to require the complainant to assign to members of the Sheet Metal Workers rather than to members of the Steelworkers the work of manufacturing the diffusers which Megatech is installing on the Greenbelt Centre project in Ottawa. There is no evidence that the Sheet Metal Workers have asked Megatech to request the complainant to assign the work to their members or that Megatech asked Price to do so. Absent such evidence, in order to find, as the complainant and interveners contend, that Megatech is the Sheet Metal Workers' agent for the purpose of subsection 91(1), the Board would have to equate Megatech's purchasing of the diffusers from Price with an assignment by Megatech of the work of manufacturing those diffusers to the Steelworkers. That is precisely what the Board in *Napev* said was an untenable conclusion on the wording of subsection 91(1) and the substantial history of its interpretation. In that case, *Napev* had let a subcontract for some masonry work to another contractor, *Venice*. *Venice* assigned the work to its employees who were represented by one trade union. A second trade union filed a grievance against *Napev* alleging that it had contravened the subcontract provisions of the collective agreement binding on it and the second union. The first union contended that the grievance

was a requirement by the second union that Venice assign the work to its members. The Board, as here, had little evidence on the terms of the subcontract. After an extensive analysis of the history of section 91 [section 81 at the time], its purpose and how its specific wording had been interpreted by the Board, the *Napev* Board concluded as follows at paragraph 18:

...While the existence of subcontract clauses may be symptomatic of underlying jurisdictional conflict and anxiety, the Board's mandate for intervening in this aspect of labour relations is limited by the specific words employed in section 81(1). On the basis of this wording and for the reasons outlined above, it cannot be said that once a contract is let pursuant to a subcontract clause a trade union is inevitably requiring "an employer" to assign particular work to persons in a particular union. A subcontract clause in a collective agreement is a contractual arrangement between a trade union and general contractor limiting the range of subcontractors the general contractor may utilize in the construction of a project. As the analysis above demonstrates, it cannot be said that the general contractor is the employer for the purposes of section 81(1) nor can it be said, at least in the abstract, that the existence of a subcontract clause constitutes a request to all subcontractors that work be assigned to members of a particular trade union. Subcontract clauses are important elements of trade union security and stability in the construction industry and section 81 may not be able to resolve all aspects of the inconvenience they can cause to particular parties. However, because of the aforementioned paucity of facts established in the instant case, an occasion for considering the precise limitations of section 81(1) in relation to subcontract clauses does not arise.

18. In the last sentence of the quoted extract from the *Napev* decision, the Board left it open for future cases to define the precise limits of subsection 91(1) relative to subcontract clauses. Those limits were examined again in *Stark, supra*. That complaint arose out of the following circumstances. Stark, the complainant, had let a subcontract to another contractor, Oshawa Paving. Oshawa Paving assigned the work to Labourers' Local 597. The Plumbers Local 463 claimed that the work was work covered by the Plumbers provincial agreement binding on it and Stark. Local 463 asked Stark to take back the work and do it with its own employees. Stark and Local 463 acknowledged that the work would have been done by members of Local 463 had Stark agreed to take the work back and perform it with its own employees. Stark, however, refused to do so. Local 463 did not ask Oshawa Paving to assign the work to its members and did not ask Stark to request Oshawa Paving to assign the work to members of Local 463. Nor did Stark approach Oshawa Paving to ask it to do so. Local 463 filed a grievance alleging that Stark had violated the subcontracting provisions of the Plumbers' provincial agreement. Stark was also bound to the Labourers' provincial agreement which contained a somewhat similar subcontracting provision. Stark filed a complaint under section 91 of the Act against Local 463. Oshawa Paving and Local 597 intervened. Stark and the interveners contended strongly that Stark, through its choice of Oshawa Paving as subcontractor had "...in fact determined which unions' members would perform the work, and that accordingly, ..., the Board should not follow the earlier cases but instead take a more 'realistic' view of the matter and treat Stark as the employer for the purposes of section 91(1)." The Board responded at paragraph 13 as follows:

...There is no question but that Stark could have performed the work itself using members of U.A. Local 463. Equally, Stark could have subcontracted the work to a mechanical firm which uses U.A. members to perform this type of work. As it turned out, Stark subcontracted the work to a firm which employed members of the Labourers' union to perform it. In these circumstances, we agree with the contention that Stark, through its choice of subcontractor, or decision to do the work itself, could have determined which unions' members would have been assigned the work in question. This being so, we acknowledge that an argument exists as to why the Board should have the jurisdiction to deal with disputes over work allocation which arise in the context of subcontracting arrangements and the enforcement of subcontracting provisions in collective agreements. Indeed, on the basis of the control exercised by a contractor over a subcontractor, the National Labour Relations Board has assumed the jurisdiction to make jurisdictional determinations in such circumstances. See: *General Motors Corporation* 99 LRRM 1609. In Ontario, however, given the language of section 91(1), its legislative history and the interpre-

tation given to the section over the years, we are satisfied that the section, as it is currently worded, does not cover the type of situation now before us, and that any possible widening of the scope of the section is a matter for the Legislature to deal with.

19. At paragraph 19, the Board in *Stark* addressed the concerns of the complainant Stark and the interveners that to deal with the "root jurisdictional issues" of the complaint under section 124 of the Act and not section 91 would mean that those issues would not likely be fully addressed. The Board expressed an understanding for their concern but concluded that "...such a concern cannot be a basis for giving section 91(1) a meaning not contemplated by the statute.".

20. In the request for reconsideration, the complainant Stark "...submitted that the purpose of section 91 is to provide a full forum for all parties to resolve competing work claims by competing trade unions.". The Board's response was:

...As the Board noted in the *Napev Construction Ltd.* case, [1980] OLRB Rep. Feb. 247, the section addresses itself to direct work assignments from employers to persons who are or who could become employees and not contractual relations between general contractors and their subcontractors. The Board's mandate for intervening in this aspect of labour relations is limited by the specific words employed in section 91(1).

21. This panel of the Board reads the *Napev* and *Stark* decisions, *supra*, to stand for the proposition that the Board's mandate under the specific words employed in subsection 91(1) does not capture every attempt to enforce a subcontracting clause in response to the letting of a subcontract, even though the presence of subcontracting clauses in collective agreements may be symptomatic of underlying jurisdictional conflict. The Board herein also understands those decisions to reject implicitly, if not expressly, the proposition that the word "employer" in subsection 91(1) includes the party which lets the subcontract. The Board finds the reasoning in those decisions to be wholly applicable to the circumstances of this complaint. Price and the interveners sought to draw a distinction between the circumstances of this complaint and those in *Napev* and *Stark* based on the fact that the complainant is a manufacturer and the work alleged to be in dispute is the work of manufacturing diffusers, whereas *Napev* and *Stark* (and the other cases referred to in them) involve the subcontracting of construction work between one contractor employer and another. They did not offer, however, any explanation of why that difference should cause the Board to arrive at a different conclusion on these facts as to its jurisdiction under subsection 91(1), or why the principles of *Napev* and *Stark*, *supra*, should not apply.

22. Certain facts are clear and unmistakable. The Sheet Metal Workers did not ask the complainant to assign the work of manufacturing diffusers to members of the Sheet Metal Workers instead of to members of the Steelworkers. Nor did they ask Megatech to approach the complainant and ask it to assign the work to the Sheet Metal Workers. There is no evidence that Megatech made such an approach after the grievance was filed. Therefore, the only basis for finding that the Sheet Metal Workers have required Price, within the meaning of subsection 91(1), to assign the manufacturing of diffusers to Sheet Metal Workers' members instead of to members of the Steelworkers would be for the Board, because of the Sheet Metal Workers' grievance, to equate Megatech's purchase of the diffusers from Price with an assignment by Megatech of that work to the Steelworkers. The Board in *Napev* and *Stark*, *supra*, concluded that, given the language of subsection 91(1), its Legislative history and the interpretation given to the language during its history, does not accommodate that equation. For the same reasons, this panel of the Board finds that Megatech's purchasing of the diffusers from the complainant combined with Local 47's grievance alleging that Megatech has violated the subcontracting provisions of the Agreement does not amount to Local 47 requiring Price to assign the work of manufacturing the diffusers to members of the Sheet Metal Workers rather than to members of the Steelworkers.

23. With respect to the remaining arguments of the interveners that there are sound labour relations reasons for the Board to entertain the complaint, even if the Board agreed that such reasons were present, the Board has only the powers given to it by the Act. It does not have inherent jurisdiction to deal with labour relations problems in general, including those which arise in the context of jurisdictional conflict between trade unions. Whatever the reason, as both *Napev* and *Stark, supra*, note, the Legislature has not given the Board a broad mandate to inquire into all such conflicts. Absent that mandate and having found that the constituent elements of a work assignment dispute within the meaning of subsection 91(1) of the Act have not been established in this complaint, the Board is satisfied that it does not have the jurisdiction to entertain the complaint.

24. For all of the foregoing reasons, the complaint is dismissed.

25. The Board turns again to the application under section 150 of the Act. Since the Board has dismissed the section 91 complaint in File No. 1683-89-JD, the section 150 application is irrelevant in the context of that complaint. Therefore, insofar as it relates to the complaint it is dismissed. As the Board noted at the outset, only the section 91 complaint had been listed for hearing before this panel of the Board. The Board received submissions respecting the section 150 application because the fact that it had been made was raised as a bar to the Board hearing and deciding the issue of whether it had jurisdiction under subsection 91(1) to entertain the complaint. That was the sole purpose of the hearing. In the course of the parties making their submissions on whether the section 150 application had or ought to be determined before the Board could deal with the issue of its subsection 91(1) jurisdiction, all parties included in their submissions reasons why the grievance referral also could or ought not be determined until the Board has disposed of the section 150 application. While the Board has been satisfied to dismiss the application insofar as it relates to the section 91 complaint because the parties had full opportunity to make their submissions on that issue, it is uncertain whether the Board has received their full submissions on the relationship of the section 150 application and the grievance referral in File No. 0957-89-G. Therefore, even though, on the submissions which it has heard, the Board is of the view the section 150 application would be dismissed, out of an abundance of caution, the Board will not dismiss it. Instead, should File No. 0957-89-G be brought on for hearing, the Registrar is directed to list with it the application made under section 150 of the Act in File No. 1682-89-M to be heard by this panel of the Board. In the meantime, File No. 1682-89-M is adjourned *sine die* and, should it not be brought on for hearing within one year from the date hereof, or not be disposed of otherwise by the Board, it will be deemed to have been dismissed.

26. In summary, File No. 1683-89-JD is dismissed and File No. 1682-89-M is dismissed insofar as it relates to the complaint in File No. 1683-89-JD and is adjourned *sine die* insofar as it relates to the grievance referred in File No. 0957-89-G.

2013-89-U Peggy Joe Gasiorek, Complainant v. Canadian Union of Public Employees Local 1263 and Regional Municipality of Niagara, Respondents

Duty of Fair Representation - Unfair Labour Practice - Complainant's claim for disability benefits rejected by insurer because time limit for filing exceeded - Union not obliged under circumstances to protect complainant's rights by soliciting a grievance from her - Complaint dismissed

BEFORE: Bram Herlich, Vice-Chair.

APPEARANCES: George Marshall, Mary Marshall and Peggy Gasiorek for the complainant; John Burns, Jeffrey Schofield, D. H. Rapelje, S. R. Hennessy, George W. Wilson, Derek Rodgers and Patricia Freeman for the respondents.

DECISION OF THE BOARD; December 17, 1990

1. The names of the respondents herein are amended to read: "Canadian Union of Public Employees Local 1263" (hereinafter referred to as the 'union') and "Regional Municipality of Niagara" (hereinafter referred to as the 'employer' or the 'region').

2. This is a complaint alleging violation of section 68 of the *Labour Relations Act*.

3. The hearing in this matter commenced on February 28, 1990 and continued on April 2, 23 and 24, 1990, and September 5, 6 and 7, 1990. During the course of those seven days of hearing, the Board heard oral evidence from 12 witnesses and received 57 exhibits. In making my findings of fact, I have carefully considered all of the oral and documentary evidence, the submissions of the parties, and such factors as the firmness and reliability of the various witnesses' memories, their demeanour while testifying, their ability to resist the influence of self-interest when giving their version of events, and the consistency of their evidence. I have also considered what is most probable in the circumstances of the case, and considered the inferences that may reasonably be drawn from the totality of the evidence.

4. In this regard a number of further general comments are in order. The evidence of the complainant was often in direct conflict or at least inconsistent with the evidence of the eight witnesses called by the respondents. While some of the events involved in this matter go back as far as July of 1986, it was patently clear that the inconsistencies and contradictions in evidence are not simply a function of benign memory lapses or incomplete recollection. The complainant, in giving her evidence, was less than forthright and seized upon every opportunity to free herself of any blame for any of the difficulties she faced. Many aspects of the case were unusual, not the least of which was the fact that the complainant was represented by her father, George Marshall, who, until his retirement in 1979, spent some 21 years working as a union representative and organizer for the United Steelworkers of America. Indeed, even George Wilson, who testified on behalf of the respondent union, acknowledged that Mr. Marshall has contributed many years of service to the trade union movement. Notwithstanding Mr. Marshall's depth of experience in labour relations matters, he acknowledged that he was not experienced in proceedings such as the present one. In any event, the unusual circumstance of a father representing and examining his daughter as a witness generated its own set of difficulties. The complainant, in her lengthy examination in chief, exhibited impatience and disdain, bordering at times on contempt, for her examiner. As might have been anticipated her demeanour showed no improvement in cross-examination. Numerous factual assertions were made without the benefit of particulars supporting the claims (e.g. evidence regarding the number of requests she made for LTD forms). In addition, her evidence was subject to numerous internal inconsistencies. Thus, even prior to considering the inconsistencies and direct

conflicts between the complainant's evidence and that of others, I was left with the general impression that much of her evidence was little more than an attempt to present the facts of her case and her own conduct in a light perceived to maximize the culpability of others. I have therefore determined, with one exception, to accept the evidence of the other witnesses who, for the most part, gave their evidence in a clear, cogent, consistent and forthright manner, where such evidence conflicts with the complainant's. The one exception is the evidence of Margaret Noble, the complainant's immediate supervisor. Mrs. Noble frequently appeared evasive and unresponsive in her evidence. She, too, contradicted herself in certain points in her evidence and, although her role in the events giving rise to these proceedings is ultimately somewhat marginal, I have determined to accept the evidence of the complainant where it conflicts with that of Mrs. Noble.

5. The complainant has been employed at Sunset Haven, a Home for the Aged run by the employer, since 1975. In July of 1986 she was involved in an automobile accident; she was also approximately three months pregnant at the time. Although initially it appeared that no significant injuries resulted from the accident, it soon became apparent that some damage had occurred. The complainant was admitted and treated in hospital for a few days in early August, 1986. During the period following the accident the complainant submitted a number of documents to the employer regarding her absence. These included a note from Dr. Kundi dated July 24, 1986 indicating she would be off work until assessed by her obstetrician; a letter dated August 18, 1986 from A. T. Lacavera, her counsel in the civil action resulting from the accident, indicating she would be off work for "sometime"; and a copy of a form dated September 5, 1986 and completed by Dr. Kundi (apparently for purposes of claiming no-fault benefits) which indicated the complainant would be off work indefinitely.

6. In the face of this documentation the employer apparently had no reason to challenge the legitimacy of her absence.

7. On September 29, 1986 Dr. J. M. Ellison, then the complainant's obstetrician, wrote a letter addressed simply to Sunset Haven. All of the participants agree that this letter was entirely unsolicited. Some of the participants raised questions regarding the propriety of a physician sending such an unsolicited letter, particularly in view of its contents. The letter read as follows:

I enclose my reports on Peggy Gasiorek. As you may know she is in the middle of pregnancy and had a fairly minor motor vehicle accident back in July. I got her seen by an orthopaedic surgeon and she seems to be managing well now. However, she wishes me to magnify the illness to the extent that she can't possibly work and I don't feel qualified to do this.

I think she is therefore seeking alternative medical attention in the hope that someone will give her the sick note that she demands. I am personally not prepared to be a pawn in the socialist system or to be utilized in this way.

I trust this will help you in your dealings with this rather demanding worker of yours.

8. By letter dated October 8, 1986 Mrs. Noble wrote to the complainant as follows:

We are in receipt of a Doctor's letter suggesting that you are able to return to work.

We have been unable to reach you by telephone as your number is not in service. It is imperative that you contact the writer immediately.

9. Although Mrs. Noble initially denied the suggestion, it is clear that this letter was sent as a result of the receipt of Dr. Ellison's unsolicited letter. Having received no reply to her letter Mrs. Noble sent the following letter to the complainant dated November 5, 1986:

I am writing to inform you of a change in your employment status at Sunset Haven.

I have tried unsuccessfully to contact you on many occasions by telephone, as well as by registered letter.

You have failed to report for your scheduled shifts and have not provided sufficient reason for your absence. Therefore, your employment is terminated immediately.

I wish you all the best in your future endeavours.

10. Apart from Dr. Ellison's unsolicited letter it is difficult to understand Mrs. Noble's concern for the complainant's whereabouts. It was clear that, given the information she had regarding the complainant's injury and pregnancy, Mrs. Noble was not anticipating an early return to work. Even assuming, however, that Mrs. Noble's concern was legitimate the efforts she made to contact the complainant left something to be desired. Her October 8, 1986 letter sent by registered mail was returned unclaimed - the complainant had moved and gave uncontradicted evidence of having so notified the employer. The telephone calls referred to were made to a number Mrs. Noble didn't deny had been disconnected. Further, it was clear from her evidence that she had a telephone number for the complainant's parents' home and knew she could contact her that way but felt she had no obligation to do so. In these circumstances one might well question the precipitous termination effected on November 5, 1986.

11. Fortunately, cooler heads prevailed and in its reply (dated December 17, 1986) to the third step grievance meeting regarding the discharge grievance filed as a result of the termination, the employer recognized that it possessed a doctor's certificate indicating indefinite leave and agreed to reinstate the complainant. This agreement was, however, subject to two conditions as follows:

- (a) That the employee's sick leave record must show marked improvement upon return to work. The record of sick leave will be monitored and recorded and any noticeable statistics indicating prolonged or regular leaves will not be tolerated.
- (b) The employee must advise the employer of her present address or any address change within five (5) days of any such change.

12. This reply, including the conditions, was not sent to the complainant but was received by Pat Freeman who was, and continues to be, the local president of the union. Ms. Freeman contacted the complainant sometime before Christmas, 1986 and advised her of the employer's position. Ms. Gasiorek was unhappy with the stated conditions and told Ms. Freeman she would consider them and get back to her. According to Ms. Freeman that never happened.

13. Indeed, the conditions outlined in the employer's letter of December 1986 were not formally accepted in writing until February 29, 1988 when George Wilson, the union's national representative, wrote to the employer accepting the conditions on the complainant's behalf.

14. Although Ms. Gasiorek testified that she communicated her acceptance of the conditions to Ms. Freeman in December of 1986 and to other union officials prior to January of 1988, I accept the evidence of Ms. Freeman and other witnesses that no such communication took place. No such acceptance was ever tendered in writing prior to 1988. Even at that time the complainant's acceptance of the conditions was less than unequivocal. On the eve of writing his letter to the employer Mr. Wilson was receiving conflicting instructions from Ms. Gasiorek and her

father, who by then was representing her, regarding whether or not the employer's conditions should be accepted.

15. While in one sense the more than one year delay in resolving the complainant's discharge and accepting the employer's conditions is disconcerting, it is easily understood. It was not until January of 1988 that the complainant felt she was physically able to return to work and secured a doctor's certificate to that effect. In the absence of the prospect of an imminent return to work one may understand the lack of any immediate perceived need on the complainant's part to resolve the discharge and the conditions attached to her reinstatement. Unfortunately for the complainant, as we shall see, her delay in resolving the discharge generated other difficulties. This is not the only example of the complainant's inaction creating such difficulties. The grievor ultimately returned to work in March of 1988 in circumstances we will return to later.

16. As early as October of 1986 the complainant began to receive what would be a series of invoices and other correspondence regarding the payment of premiums for various benefits. Under the collective agreement it would appear that the employer had no obligation to continue to pay its share (in most cases 100%) of the premium cost for various benefit plans once an employee absent from work had exhausted her sick leave credits (as the complainant had). Notwithstanding this there existed a practice (which was codified in the next collective agreement) of allowing employees to continue benefits coverage by assuming the full premium costs. This option was offered to the complainant who received, at various times, invoices for premiums for the months of September - December inclusive, 1986. Also involved in these invoices was a claim from the employer for reimbursement as a result of the complainant having received both sick pay and WCB benefits in respect of the same period earlier in 1986. From October of 1986 until April of 1987 there is no evidence of any meaningful reply from the complainant regarding these invoices. Indeed, the evidence of the complainant was that she simply ignored these various invoices.

17. Matters changed in April of 1987 for at least two reasons. First the complainant received a cheque from the employer in respect of certain payments of retroactivity. However, against these monies due, the employer set off the monies it claimed from the complainant for, *inter alia*, premium payments. This set off was performed without the complainant's consent and caused her to contact Mr. Wilson. In addition at around the same time the complainant was being required to pay a hospital bill in the amount of \$320 in respect of a stay in hospital in January, 1987. There was no dispute that this was the type of bill which would have been covered by the semi-private hospital care contemplated by the agreement *had the premiums been paid for such coverage*.

18. In any event the complainant raised her concerns with Mr. Wilson who as a result wrote the following letter (dated April 13, 1987) to Mr. D. H. Rapelje the Director of the employer's Senior Citizen's Department:

I am writing to you to confirm my telephone request to Ms. Mickle for a detailed accounting of the Region's billing for repayment of benefits paid on Ms. Gasiorek's behalf.

I would like to know for what time periods the benefit payments were made and from what sources the monies owing were recovered. Specifically, I would like to know:

- 1) Ms. Gasiorek was off on W.C.B. from mid April to the end of April, 1986. The Employer disputed the claim and Ms. Gasiorek had to use eight days' sick leave and some of her vacation. After investigation, the W.C.B. claim was allowed. Were those sick days and vacation reinstated for her later use?
- 2) Ms. Gasiorek was terminated and then reinstated as of December 17, 1986. As a result of the termination, Ms. Gasiorek was taken off the Region's benefit plans and

had to pay the Welland General Hospital \$320.00 for the difference between ward and semi-private coverage. Was Ms. Gasiorek reimbursed for this amount?

- 3) Ms. Gasiorek had a car accident in July, 1986 and has been off since then due to a combination of back injury, pregnancy and birth. She has received several billings for benefit payments and received a cheque for retroactive payment of wages in which the cheque stub showed an amount of \$510.16 due to her but the cheque itself was for zero amount. Was the zero amount due to the \$510.16 being applied to her benefit repayments? If so, did you receive her authorization to do so? For what period was the benefit repayment billings for? What is her present status, on unpaid leave of absence due to illness or pregnancy leave?

I would appreciate your help in sorting this matter out.

19. By letter dated April 23, 1987, Miss R. J. Mickle, the employer's personnel officer responded to Mr. Wilson as follows:

In reply to your letter of April 13th, addressed to Mr. Rapelje, enclosed please find a copy of several invoices and a summary of the status of monies owed by our above-named employee. For you [sic] information, Mrs. Gasiorek was terminated under our various benefit plans as at December 1, 1986. Mrs. Gasiorek was terminated in accordance with Article 29.05 of the Collective Agreement. Although we were willing to continue coverage under our plans at Mrs. Gasiorek's expense you will note from the attached documentation that we were unable to collect on various invoices sent to her. Our Insurer's advised that she had a claim paid in November and she has therefore been billed up to and including that month.

Although your letter states that Mrs. Gasiorek was reinstated, her status as far as we are concerned is still unsettled as to my knowledge we have had no reply to Mr. Rapelje's letter of December 17th outlining the conditions upon which we would agree to reinstate Mrs. Gasiorek. Further, Mrs. Gasiorek continues to be uncooperative in that she will not reply to letters, she will not keep us advised as to her status and will not return telephone calls.

If there is any further information that we can provide please get in touch with us.

Attached to that reply were a number of the invoices already referred to as well as a hand-written calculation of various amounts owing.

20. Mr. Wilson forwarded a copy of this reply to the complainant and asked her to advise him of any inaccuracies it may have contained. No response was forthcoming.

21. The matter of the Hospital bill was pursued, however, as Sharon Simpson, a union steward at Sunset Haven, filed a grievance at the complainant's request. Although the grievance is not dated it appears to have been filed in June of 1987 and claims that "for a period of time I was taken off the Benefit plan" and requests that "the region pay for my hospital Bill".

22. The grievance was denied on the basis that the grievor's benefits had been discontinued. (In this regard we should note that although there were outstanding invoices regarding benefit payments for August to November of 1986, there were no such invoices for January of 1987 (when the hospital bill was incurred) and no party suggested that any premiums were ever paid in respect of that time period.)

23. By letter dated July 24, 1987 Derek Rodgers advised the complainant as follows:

Please find enclosed a copy of Mr. Rapelje's reply to your grievance re- Payment of Benefits.

C.U.P.E. Local 1263 Executive Committee discussed your case in the light of the reply and the Committee's decision is not to proceed to arbitration on the basis that it is not in the best interests of the membership to do so.

You realise that you have the right to appeal this decision to the general membership but the next meeting is not until september 14, 1987 which would nullify the grievance because of time.

You can, if you wish, ask for an emergency [sic] meeting of the Executive committee to appeal their decision.

You also have the right to proceed to arbitration on your own but in such case you would be responsible for paying all costs.

24. Both Mr. Rodgers and Mr. Wilson testified that the decision not to advance the complainant's grievance to arbitration was made in order to preserve the employer's practice of allowing employees on long term absences to continue their benefits coverage at their own cost either through direct payment or through an agreement to reimburse the employer for such costs upon return to work. From discussions in the course of the grievance procedure Mr. Rodgers and Mr. Wilson concluded that this practice, which was not explicitly required by the collective agreement, would be jeopardized if the complainant's grievance were advanced to arbitration.

25. In any event the complainant did not respond to Mr. Rodgers' letter. Neither was there any evidence that she took any steps to appeal the decision as outlined in Mr. Rodgers' letter nor sought to have the grievance advanced to arbitration in any fashion at that time. Indeed it would appear that the issue of this \$320.00 hospital bill was not seriously raised again until June of 1988 and subsequently with the filing of this complaint on November 13, 1989.

26. Approximately 6 months after the union decided not to advance the grievance regarding the hospital bill to arbitration, the complainant determined that she was fit to return to work. In support of this determination she filed with the employer a note dated January 6, 1988 from Dr. Sheilagh Hope, which reads in its entirety: "Fit for duty". In response to her request, the employer advised that prior to her return to work, after an absence of almost a year and a half, it would be necessary for her to undergo a medical assessment by a physician designated by the employer. In addition the employer also advised that the outstanding conditions in the employer's third step grievance reply would have to be addressed in order to resolve what it viewed as the still outstanding discharge grievance.

27. By letters dated January 25 and 28, 1988, the complainant agreed to supply further medical information and agreed to a medical examination by the employer's physician. The complainant's second letter also included the following:

I would also expect that as I handed my Doctors reports to Mr. Rapelje on Jan 7/88 that I be paid wages and benefits lost following the 14 days provided for in the agreement.

28. None of the participants reviewed (in evidence or argument) the significance of this statement and, upon reviewing the collective agreement, I am unable to find any basis for the statement.

29. During the course of the discussions which resulted in the complainant's ultimate return to work, the employer also required, given the length of her absence, that the complainant participate in one of the employer's periodic orientation classes prior to returning to work. The complainant agreed to this as well.

30. As indicated earlier, the employer's conditions were accepted by Mr. Wilson in the letter dated February 29, 1988 as follows:

This letter is in response to our telephone conversation of this date where it was agreed that I would confirm in writing that the conditions set out in your letter of Dec. 17, 1986 is satisfactory

and that she will be reinstated on that basis, this has been discussed with Mrs. Gasiorek and she has advised me that this is acceptable to her.

Would you inform Ms. Noble that you have received this letter in order that Ms. Gasiorek might be reinstated in time to join the orientation class which is going to start on Monday March, 7th, 1988.

31. As late as the day or the day before Mr. Wilson forwarded this letter he was being urged by Mr. Marshall, who was representing his daughter, to reject the conditions and take the matter to arbitration. In a contemporaneous conversation with the complainant, however, she reluctantly agreed to accept the conditions and Mr. Wilson wrote the above letter based on those instructions.

32. The complainant consequently returned to work on or about March 7, 1988.

33. Shortly after her return to work a number of issues arose related to her lengthy absence. Despite her evidence to the contrary, I find that only subsequent to her return to work did the complainant raise, for the first time in any significant fashion, the question of her entitlement to long term disability benefits (LTD) during her absence. In addition questions relating to coverage and premium payments during her absence resurfaced.

34. At Ms. Gasiorek's request the union inquired of the employer as to why the complainant did not qualify for LTD. By memorandum dated March 22, 1988 Ms. Mickle, on behalf of the employer, replied as follows:

I suppose that one of the reasons she did not qualify is that at no time did she institute a claim.

I would point out that our information indicates that this employee was in a motor vehicle accident on July 20, 1986 and further that the qualifying period for long-term disability benefits is "expiration of sick leave credits or 90 calendar days whichever is later". It would appear, therefore, that Mrs. Gasiorek would not in any event have qualified for LTD until October 17, 1986.

I would point out further that the terms of our policy with our LTD carriers state that Mrs. Gasiorek would have had to be unable to perform the duties of *any* occupation; and further that we have a doctor's report indicating that he would not state that she was unable to work.

We would also point out to you that Mrs. Gasiorek was billed for the cost of benefits for the months of August, September, October and November 1986 and did not submit payment to us for these benefits. The invoices for the months of August and September were only paid by allocating retroactive pay; and the months of October and November, as of this date, remain unpaid. She would not therefore have had LTD coverage at the time she qualified for LTD had she been qualified medically.

We trust this answers your question.

35. While this response posits a number of different possible explanations for the complainant not qualifying for LTD, it is the inclusion of the last of these (no coverage at the material time) which is perhaps unfortunate in view of subsequent events and in view of positions advanced and lines of questioning followed at the hearing in this matter.

36. The collective agreement requires the employer to pay 75% of the premium for a mutually agreed upon LTD plan. The plan entered into in accordance with this obligation has a 90 day qualifying period. Benefits commence one month after the end of the qualifying period and a claim, to be timely under the terms of the policy, must be filed within 3 months after the end of the qualifying period - in the complainant's case by mid-January 1987.

37. While, as we have already seen, there was some dispute still unresolved at this point in time between the complainant and the employer regarding the payment of benefit premiums (including LTD) for the months August to November of 1986, the evidence clearly indicates that the employer had paid these premiums on behalf of the complainant and was seeking reimbursement from her for those costs. Thus Ms. Mickle's assertion, even in March of 1988, that the complainant did not have LTD coverage for October and November of 1986 seems incorrect. I have called this assertion unfortunate because the parties all agreed that LTD premiums were paid for the relevant period (even if retroactively) and, in any event as we shall see, when the insurance company ultimately rejected the LTD claim it never asserted that the rejection was related to lack of coverage or non-payment of premiums.

38. Upon receiving Ms. Mickle's reply, Mr. Rodgers contacted the complainant and advised her of its contents. He asked her for a written reply which the complainant subsequently provided. I note that this reply is intricately detailed with respect to amounts of money claimed owing including the claim regarding the \$320.00 hospital bill. In addition, it clearly asserts the complainant's view of her entitlement to LTD. Despite the otherwise intricate detail, however, nowhere in this document does the complainant suggest any earlier request for LTD application forms from the employer - requests which she later claimed had been denied on numerous occasions.

39. Mr. Rodgers, by letter dated June 20, 1988 wrote to the employer supporting various aspects of the complainant's claim. He challenged the employer's assertion that the LTD coverage was not in place in October and November of 1986, raised various issues regarding monies owing and the unilateral set off against retroactive pay and concluded that, assuming a proper accounting, an arrangement could be made for weekly deductions from the complainant's pay to reimburse the employer for any amounts still outstanding. In this respect it is again significant to note that all parties agreed that payment for premium benefits during the relevant period was exclusively the complainant's obligation. Mr. Rodgers also attached a copy of the complainant's written reply referred to in the previous paragraph.

40. While none of the parties offered any coherent account of what transpired in the interim, a meeting was held on September 29, 1988 and was attended by the complainant, union officials, and employer representatives. Following a detailed accounting provided by Bill Szakaly, an accountant in the employ of the region, the parties were able to agree on all monies outstanding and further agreed to weekly deductions from the complainant's pay to discharge her debt.

41. At that meeting the complainant was provided, for the first time, with the forms necessary to file an LTD application. These forms were not completed and submitted to the employer by the complainant until March of 1989. The employer then forwarded a package of documents, including Dr. Ellison's controversial letter dated September 29, 1986 to the insurance company. By letter dated April 19, 1989 the insurance company rejected the claim for benefits in the following terms:

We have completed our assessment of your claim for disability benefits.

Under the terms of this policy a claim must be received by us within three months after the end of the qualifying period. According to the information received, you became totally disabled on July 21, 1986. Therefore, you would have qualified for benefits on October 19, 1986 and your claim should have been received by January 19, 1987.

Since we did not receive your claim until April 5, 1989, we must decline benefits based on the late filing restriction in the contract.

One reason for the time limit is to ensure our right to a full investigation of your condition, and possibly an independent medical examination, at/or very soon after the time you would have qualified for benefits under the disability provision.

I'm sorry, but since we didn't receive your claim within the time limit stated in the policy, we must deny your claim.

42. At about the same time that the complainant filed her LTD application with the employer, she also approached Bonnie Robison, the union's unit chairperson at Sunset Haven, and requested that a grievance be filed regarding non-receipt of LTD benefits. Ms. Robison, after receiving advice regarding the appropriate wording for such a grievance, advised the complainant that she was ready to file the grievance on her behalf. Ms. Gasiorek said she would have to consult with her father, Mr. Marshall, who was now representing her. By early May the complainant had still not responded so Ms. Robison contacted her again and was advised that Mr. Marshall was still "checking into it". Ms. Robison never received any instructions from the complainant to file the grievance.

43. The complainant's claim is threefold. It is asserted that the union breached its duty of fair representation by:

- a) failing to accept the conditions attached by the employer to the complainant's reinstatement in a timely fashion thus delaying the complainant's return to work from January 6, 1988 to March 7, 1988;
- b) failing to advance the complainant's claim regarding the \$320.00 hospital bill to arbitration and;
- c) failing to advance the complainant's claim for LTD benefits to arbitration.

44. Section 68 of the *Labour Relations Act* provides:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

45. 1. 1. The delay in the complainant's return to work.

Given my finding that the complainant did not, prior to January 1988, communicate her acceptance of the employer's conditions to the union (or to the employer), this aspect of her claim is difficult to support. While the factual finding is at variance with the complainant's evidence to the contrary, it is consistent with the testimony of numerous other witness whose evidence I accept. Whatever one's view of the propriety of the conditions imposed, the complainant's position that the union should have accepted them sooner is difficult to accept in view of the conflicting messages provided to the union on this point. Neither did the complainant strike me as the type of person who was incapable of putting such an acceptance, if it existed, in writing. Given that the union acted promptly upon receiving clear notification from the complainant of her acceptance of the conditions, any delay in her return to work cannot be attributed to the union.

46. In any event, I cannot help but observe that the approximate eight week delay between Dr. Hope's "fit for duty" note and the complainant's return to work may well be fully attributable to factors other than any delay in accepting the conditions. In view of the complainant's agreement

to an examination by the region's physician and to attending an orientation course prior to returning to work, the eight week period would, in all likelihood, not have been significantly shortened.

47. This aspect of complaint is therefore dismissed.

48. 2. The claim for the \$320.00 hospital bill.

49. In argument Mr. Marshall did not, subject to one qualification, seriously press the claim for \$320.00 hospital bill.

50. Without reviewing this aspect of the claim in great detail, Mr. Marshall's qualified acknowledgement that this aspect of the claim is without merit is readily apparent. No premiums had been paid for the coverage in question and under the terms of the agreement the complainant was not eligible for such coverage. Even apart from that the union's decision not to advance the grievance to arbitration was reasoned and rational given (not only the dubious merits of the claim but also) the possible negative affect on other bargaining unit members in advancing the matter to arbitration. Finally, there was no evidence to suggest that the complainant challenged or even disagreed with the union's decision at the time it was taken. The issue of the hospital bill, having been disposed of by the union, was not raised for close to a year nor did the complainant take advantage of any of the internal union appeal procedures offered to her.

51. Subject to the qualification which follows, this aspect of the complaint is also dismissed.

52. Under the terms of the collective agreement, premiums for benefits are continued to be paid by the employer in respect of employees receiving LTD. Thus, had the complainant been in receipt of LTD prior (and continuing) to January 1987 when the hospital bill was incurred, her insurance coverage would have been in place.

53. Thus, I cannot finally dispose of this aspect of the claim without considering the third area of the complaint.

54. 3. The claim for LTD benefits

Some further review of the evidence is required in the context of this aspect of the claim.

55. The complainant was injured in July, 1986, she received LTD application forms in September, 1988 and filed her application in March, 1989. The complainant testified that prior to September of 1988 and as early as August of 1986 she endeavoured to secure LTD application forms. She claimed that during that period she made numerous requests (up to 10) of Ms. Mickle for the relevant forms. She testified that in each case (prior to September, 1988) Ms. Mickle refused to provide the forms and, although specific details of the various requests were not provided, asserted that Ms. Mickle advised her she was not eligible for LTD. On one occasion she did secure (although not from Ms. Mickle) and subsequently file a form which she thought was an LTD form but which in fact was related to her pension plan (OMERS). She agreed that anyone who bothered to adequately read the form would have known that it related to OMERS and not to LTD. Ms. Mickle, on the other hand, denied that any request for an LTD application form had been made prior to September of 1988 and further testified that had such a request been made she would have had no reason to refuse to comply. None of the various union witnesses who testified had any recollection of the complainant raising any issue related to LTD prior to her return to work (January, 1988) or the next months following. That evidence is consistent with the complainant's admission that she never sought (at least prior to September, 1988) any assistance from anyone in the union to require the employer to furnish the LTD forms she claims she was requesting. Similarly the

complainant acknowledged that, prior to March of 1989, she made no request of anyone in the union to file a grievance regarding LTD benefits. Finally, while there was no dispute that the complainant asked Ms. Robison to file a grievance on her behalf in March of 1989, the complainant's evidence was that although she never signed it (as she had with previous grievances), Ms. Robison advised her that the grievance had been filed but was subsequently lost or misplaced. As already indicated, Ms. Robison's evidence was that the complainant never gave her the instructions she was awaiting before filing the grievance.

56. Although I have already set out some general observations and conclusions about the complainant's credibility, I find it necessary to specifically find that her evidence regarding the events just recounted strikes me as highly improbable in the circumstances. Had the complainant been trying unsuccessfully for over two years to secure LTD forms one would have expected some supporting written documentation or, at a minimum, some evidence of an attempt to secure the union's assistance. Similarly, had the complainant believed since August of 1986, that she was wrongfully being deprived of LTD benefits, one would have thought that a request to file a grievance would have pre-dated March, 1989. It may well be that the complainant has internalized what I have referred to as the unfortunate paragraph in Ms. Mickle's March 1988 reply regarding LTD entitlement and seized on that response giving it exaggerated importance. In any event I accept the evidence of the union and the employer and find that the complainant did not raise any issue of LTD entitlement prior to her return to work in January 1988, did not ask for LTD forms until September of 1988, did not request any grievance be filed until March of 1989, and filed the present complaint before giving the union the final instructions they were awaiting regarding whether or not to file the grievance.

57. In the context of these facts it is difficult to see any merit whatsoever in the complainant's claim against the union.

58. While more prompt action might have resulted in a successful LTD application, the lack of timely steps taken can hardly be attributed to the union. This is not the only example of the complainant's procrastination - just as she allowed the issue of the conditions attached to her reinstatement to languish, just as she ignored the employer invoices regarding benefits payment, just as she resurrected the claim for the hospital bill months after it was apparently resolved, so too did she allow a situation to evolve where a claim for LTD benefits was not filed until almost 3 years after the injury giving rise to the claim (note here that even after receiving the requisite forms it took the complainant close to six months to file the application).

59. In the face of these facts, the complainant argues that the union should, having been possessed of sufficient information regarding the complainant's situation, have taken positive steps to protect and insure her rights under the collective agreement. While it might be possible to conceive of circumstances where a union which deliberately turns a blind eye to an employee's employment difficulties may be found to violate its statutory obligations, this is certainly not that case. In any event this Board is cautious in not imposing unrealistic or excessive positive duties upon unions discharging their statutory obligations. As the Board observed in *Tony Mederios*, [1986] OLRB Rep. Nov. 1541 at paragraph 20:

To hold that a union violates section 68 by awaiting some indication from potential grievors that they wish to complain about their treatment at the hands of the employer, would be to place an unreasonable burden upon a union. When a union learns that an employee has suffered employment consequences, but has not sought its help, though there has been ample opportunity to do so, it cannot be said that the union acts arbitrarily, or in bad faith, by declining to actively seek out that employee to advise them of their rights. If, as counsel for the complainants suggested, the union had a positive duty to seek out and advise the potential grievors of their rights under the collective agreement given that the union was then aware of the discharges, union would be

routinely and constantly required to approach employees and explain to them all their rights and obligations under the collective agreement. A union would be required to meet, individually or collectively, with all such employees and not only recite each clause of the collective agreement, but explain to the satisfaction of all employees what such clauses meant. It simply cannot be sustained that a failure to do so amounts to arbitrary or bad faith conduct within the meaning of section 68 of the Act. If any positive duty does exist, it is the duty of employees who want union assistance to so request it.

60. Thus, even if I were prepared to find that the union (by virtue of the cumulative knowledge of the many individuals involved in the complaint's case over a period of years) possessed sufficient information to know of a possible grievance regarding LTD benefits, I would not be prepared to find, in the circumstances of this case, that the union violated its statutory duty by not actively seeking to solicit the filing of the grievance.

61. Indeed, in the circumstances of this case, even if the union had refused, in March of 1989, to process an LTD grievance it is difficult to see how such a refusal could be characterized as violation of the Act. Mr. Marshall conceded that given the lapse of time and given the limited employer obligations under the agreement (the employer is obliged to provide the plan not the benefits) the likelihood of any successful grievance could be generously described as remote.

62. In view of all of the above this final aspect of the complainant's claim (including any subsisting claim regarding the hospital bill) is dismissed.

63. Having dismissed the complainant's claim in its entirety, I feel compelled to offer some additional comments which may assist the parties. Mr. Marshall advised us that he had been invited (on more than one occasion) by the insurance company to appeal their decision denying benefits. Although consistent with the complainant's conduct generally, it is difficult to understand why this invitation was not acted upon. Nothing in this decision precludes any of the parties from taking any steps available to convince the insurance company to reconsider its decision. Indeed, it might well be in the interests of future harmony between all the parties to co-operate in any such effort.

64. While there is obviously no guarantee that any such efforts would be successful, there are a few factors the parties may wish to bear in mind should this avenue be pursued. While some twenty documents were filed in these proceeding containing medical information of various sorts it would seem that only a handful of these documents were available to the employer, the union or the insurance company prior to these proceedings. Secondly, it may well be that Ms. Mickle's "unfortunate" reply regarding Ms. Gasiorek's LTD eligibility may have contributed to the delay in filing the application. Finally, and perhaps most important from the insurance company's point of view, the actual value of the LTD claim may well be far less than one might assume at first blush. Although the claim involves an absence in the range of 15 months, I was advised of a number of factors: benefits are not payable until one month after the 90 day waiting period; the complainant received a significant cash settlement in respect of the civil action commenced; the complainant received maternity benefits and was apparently on (or eligible for) maternity leave during a portion of the period in question - each of these factors may serve to reduce the final value of any successful claim. Were the parties to co-operate in seeking to appeal the insurance company's decision, all of the above should be brought to the insurance company's attention.

65. The complaint is dismissed.

1007-90-G Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, Applicant v. Ideal Railings Limited, Respondent

Construction Industry - Construction Industry Grievance - Union referring grievance for arbitration under construction industry provisions - Union not certified to represent construction industry employees of employer - Collective agreement between employer and union not covering employees in construction industry - Employer and union both within definitions in construction industry provisions - Board having jurisdiction to hear referral under construction industry provisions

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *D. A. MacDonald* and *C. A. Ballentine*.

APPEARANCES: *N. L. Jesin, M. Pollock, D. Smith* and *C. Guerrero* for the applicant; *Richard J. Nixon, Ian Bacque, Jim Church* and *Miro Plavsic* for the respondent.

DECISION OF N. B. SATTERFIELD, VICE-CHAIR, AND BOARD MEMBER C. A. BALLEN-TINE; December 20, 1990

1. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding arbitration pursuant to section 124 of the *Labour Relations Act*.

2. The respondent filed a reply to the referral at the hearing scheduled for it. The reply questioned the Board's jurisdiction under section 124 of the Act to arbitrate the grievance on the grounds that "...the Respondent does not operate a business in the construction industry.", or in the alternative, "...if the respondent does operate a business in the construction industry, the Applicant was never certified to represent any employees of the Respondent working in the construction industry and the collective agreement between the Applicant and the Respondent does not cover any employees of the Respondent working in the construction industry.". At the hearing the respondent pursued its claim that the Board was without jurisdiction under section 124 of the Act to entertain the grievance and, in any event, even if the Board found that it had jurisdiction to entertain the grievance, it had the discretion to refuse to do so.

3. The facts are not in dispute. The respondent manufactures wood and metal railings and installs them primarily in houses and mostly while under construction. The applicant, which the Board will refer to also as the union, was certified on August 7, 1986 pursuant to subsection 7(3) of the Act in an application brought under subsection 5(1) of the general provisions of the Act. The certificate describes the bargaining unit of the respondent's employees in the following terms:

all employees of Ideal Railings Ltd. working at and out of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, sales and clerical employees.

The collective agreement in effect at the time of the grievance describes the bargaining unit in identical terms. At the time of the hearing of this referral, there were approximately 25 employees engaged in the manufacture of railings and 8 or 9 engaged in installing them. The employees who install railings are classified under the collective agreement as installers and installers' helpers. The manufacturing employees only rarely do installation and installation employees only rarely do manufacturing. Similarly, manufacturing employees rarely transfer to installation or exercise seniority on lay-off to bump into installation work.

4. The grievor, Manuel Iglesias, works in manufacturing and does no on site installation work. The grievance alleges that he was suspended for eight days without just and sufficient cause. The form on which the grievance was filed with the respondent is titled "Industrial Grievance Form" and employs nomenclature typical of the industrial context; for example terms like shop, "plant" manager and "plant" superintendent. This is the first time that the union has referred a grievance under its collective agreement with the respondent for final and binding arbitration under section 124 of the Act. Previously, it has taken five grievances to arbitration under section 45, including one for Iglesias involving discipline. The collective agreement between the union and the respondent contains the kind of union security, seniority, vacations and holiday pay provisions which are typical of collective agreements in an industrial, non-construction context. Clause 2.02 provides that the employer will recognize the union at the new location should the employer's operations be transferred beyond the geographic scope of the bargaining unit described in the collective agreement. Prior to making the current collective agreement, the union filed a Request for Appointment of Conciliation Officer on the general form stipulated "not for use in the Construction Industry". The application was made by its solicitors at the time, different than its solicitors for this application. Both firms have appeared frequently before the Board on behalf of the union.

5. The respondent's claim in its reply that it did not operate a business in the construction industry is an allusion to the provision in subsection 124(1) of the Act that "...a party to a collective agreement between an *employer*...and a *trade union*...may refer a grievance...to the Board for final and binding determination.". Section 124 is part of the construction industry provisions of the Act. Therefore the words "employer" and "trade union" in subsection 124(1) mean as defined in section 117, clauses (c) and (f) as follows:

...

(c) "employer" means a person who operates a business in the construction industry, and for purposes of an application for accreditation means an employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof;

...

(f) "trade union" means a trade union that according to established trade union practice pertains to the construction industry.

By inference, if the respondent is not an employer as defined in clause (c) or the applicant is not a trade union as defined in clause (f), the Board has no jurisdiction to arbitrate a grievance referred under subsection 124(1) by either of them.

6. It is uncontested that the applicant is a trade union which satisfies that definition and the Board so finds. The respondent's claim that it was not an employer as defined in clause (c) was pursued only indirectly in final argument on the issue of the Board's jurisdiction under section 124. The claim was implicit in the respondent's argument that the applicant did not have any bargaining rights in the construction industry for any of the respondent's employees. In addition, in rebuttal of applicant counsel's argument, respondent counsel twice stated that the respondent is not an employer in the construction industry. Those statements were made without reference to any particular authority and even though it was an agreed fact that the respondent installs wood and metal railings, which it manufactures, "primarily in houses and mostly while under construction". Lest there be any doubt whether, on the basis of that fact, the respondent is an employer within the meaning of clause (c) of section 117, the Board finds that Ideal Railings Limited is a person who operates a business in the construction industry and, therefore, is an employer for purposes of subsection 124(1) of the Act. In making the finding that the respondent is an employer as defined in

clause (c) of section 117, even though it may not be primarily or exclusively engaged in construction and its construction activity might be limited to the installation of its own products, the Board relies on and adopts the reasoning of the Board in *Tops Marina Motor Hotel*, [1964] OLRB Rep. Jan. 583 and *Kapuskasing Board of Education*, [1972] OLRB Rep. June 587 and the numerous other Board decisions which have dealt with the definition of employer in section 117(c) referred to at paragraph 17 of *The Kinsman Club of Leamington*, [1983] OLRB Rep. Nov. 1850.

7. The fact that the respondent is an employer and the applicant is a trade union, each as contemplated by subsection 124(1) of the Act, and are bound to a collective agreement which applies to employees of the respondent who are employed in its construction activities is all that is required, according to applicant counsel, for the Board to have jurisdiction to arbitrate a grievance "...concerning the interpretation, application, administration or alleged violation of the agreement...". That is so, counsel submits, even though the grievance, as here, concerns one of the respondent's employees who was not engaged in its construction activities when the grievance arose. Counsel relies for that proposition on *Babcock and Wilcox Canada Ltd.*, [1988] OLRB Rep. Dec. 1198 and *Carroll Electric (1982) Limited*, [1983] OLRB Rep. Aug. 1282.

8. Respondent counsel disagrees. He contends that the Board does not have jurisdiction under section 124 to arbitrate the grievance which has been referred to it because the applicant does not have bargaining rights in the construction industry for any of the respondent's employees and it is attempting to use this referral of a grievance under section 124 in order to obtain such bargaining rights. As the Board understands his argument, there are several reasons why the Board should conclude that the applicant lacks the bargaining rights which he says are requisite for the applicant to have access to section 124 of the Act and they are as follows.

9. First, the applicant acquired its bargaining rights in 1986 by successfully bringing an application for certification under the general provisions of the Act, not the construction industry provisions. The bargaining unit proposed in its application was not described in terms of any of the 32 geographic areas recognized by the Board as satisfying the requirements of subsection 119(1) of the Act, any construction trade or any sector of the construction industry as would be the case had the application been brought under section 144 of the Act, which the applicant, as an affiliated bargaining agent, was entitled to do. For all practical purposes, the unit proposed by the applicant was the one found by the Board to be appropriate for collective bargaining. Therefore, the description of the unit for which the applicant was certified displays none of the hallmarks of a bargaining unit description common to construction industry certificates, such as being limited to a construction trade and geographic area or referring to construction industry sectors. On the other hand, the bargaining unit described in the application for certification and ensuing certificate bears the hallmarks of an industrial application and certificate and none of the construction industry. In turn, clause 2.01 of the collective agreement parrots the unit described in the Board's certificate, therefore, counsel submits, the parties did not bargain an expansion of the bargaining rights contained in the certificate. While counsel concedes that employees in the installer and installer's helper classifications of the collective agreement do the railing installations in houses under construction, because the union was certified under the general provisions of the Act and not the construction industry provisions, he contends that the installation work which they perform is not construction industry work. Since the employees engaged in installation and the manufacturing employees, according to counsel, are not commonly associated in their work or bargaining, had the union been seeking construction industry bargaining rights for the employees who work in construction, it would have had to apply under section 144 for a unit of the installation employees. That, counsel argues, is the only way the applicant can get construction industry bargaining rights by certification. Furthermore, since the Board had certified the applicant under the general provisions of the

Act and not the construction industry provisions, it must have concluded that installers and installers' helpers were not performing construction industry work.

10. Second, the union's conduct prior to making this referral demonstrates its own recognition that it lacked bargaining rights for the respondent's employees in the construction industry. In five prior grievances taken to arbitration, the union applied for arbitration under section 45 of the Act, not section 124, and one of the five grievances involved a discipline grievance for the grievor in this referral. In addition, when the union filed a request in February 1988 for a conciliation officer in its negotiations with the employer, the application was made by the union's solicitors, experienced in construction labour relations, on a form which specifically states it is not for use in the construction industry. Counsel submits that the inference to be drawn from the request made in that form is that the union's solicitors believed at the time that the parties and their collective bargaining relationship were not in the construction industry.

11. Third, the structure and content of the collective agreement and the form and content of the grievance which has been referred for arbitration reflect the industrial nature of the bargaining relationship. The collective agreement contains terms and conditions which for the most part typify those found in collective agreements in the industrial context, not the construction industry. It contains few if any terms and conditions common to construction industry agreements. The grievance form is titled "Industrial Grievance Form", it describes the grievor's department as "shop" and provides for the employer's replies to the grievance to be signed by the "plant" superintendent and "plant" manager. Those features of the grievance form, counsel submits, betray the industrial character of the respondent's operations and the fact that the applicant's bargaining rights did not extend to the construction industry.

12. Counsel for the respondent argues further that section 124 was introduced into the Act in order to address the problem of job site work stoppages being used to remedy grievances because the arbitration mechanism at the time was not suited to the time constraints of the relatively brief employment relationship typical of the construction industry. Section 124 was intended to allow quick access to the Board as an arbitrator for the benefit of on-site construction industry employees, not shop employees. No one has ever held out section 124 to be for the benefit of shop employees, according to counsel. The grievance at issue involves the discipline of a shop employee who has never worked in construction for the respondent and section 124 was never meant to serve that type of grievance.

13. Finally, even were the Board to conclude that the applicant can bring a grievance for arbitration under section 124 of the Act, the applicant on five prior occasions has arbitrated grievances under section 45 of the Act, including a similar grievance for this grievor, and, for reasons of consistency, counsel contends that the Board should not allow a party to use section 45 one time and section 124 another. Moreover, it makes no industrial relations sense to make section 124 arbitration available because the respondent's employees are not exposed to the short-lived employment relationship typical of the construction industry. This is particularly so with the grievor herein, counsel submits, because he is employed solely in manufacturing and not exposed to the mischief of delay and its impact on the short-lived aspect of on-site employment. Counsel reads subsection 124(2) of the Act as giving the Board the discretion to refuse to entertain grievances properly brought under subsection 124(1).

14. Respondent counsel cited *M. G. Burke Investments Ltd.*, [1978] OLRB Rep. April 348 and *London Sandblasting & Painting Limited*, [1982] OLRB Rep. Sept. 1322 for the proposition that the Board's jurisdiction under section 124 of the Act was restricted to the construction industry and that it lacked jurisdiction to act as an arbitrator on matters arising outside of that industry.

To the extent that *Carroll Electric, supra*, and *Babcock and Wilcox Canada Ltd., supra*, might be read as holding that the Board in particular circumstances has jurisdiction under section 124 of the Act to arbitrate disputes involving work outside of the construction industry, they are to be distinguished on their facts. In any event, counsel argues, the Board's reasoning for taking jurisdiction under section 124 in the latter two cases supports his argument that the Board should not do so for this grievance, a grievance not associated in any of its circumstances with the construction industry. Counsel finds that support in the fact that, according to him, the Board's reasoning focused on particular circumstances of concern to the Board and it was persuaded by those concerns to take jurisdiction. Those concerns are not present in this case.

15. Section 124 provides as follows:

124.-(1) Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

(2) A referral under subsection (1) may be made in writing in the prescribed form by a party at any time after delivery of the written grievance to the other party, and the Board shall appoint a date for and hold a hearing within fourteen days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing.

(3) Upon a referral under subsection (1), the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and the provisions of subsections 44(6), (8), (9), (10), (11) and (12) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.

(4) The expense of proceedings under this section, in the amount fixed by the regulations, shall be jointly paid by the parties to the Board for payment into the Consolidated Revenue Fund.

16. Applicant counsel relies on *Carroll Electric* and *Babcock and Wilcox, supra*, in support of his claim that the Board has jurisdiction under section 124 to arbitrate the grievance referred herein. He relies primarily on *Babcock and Wilcox* and characterizes the decision as an open invitation to refer this grievance for arbitration by the Board under section 124 of the Act instead of under the terms of the collective agreement and section 45 of the Act.

17. *M. G. Burke, supra*, involved wage claims for construction work and non-construction work and a dispute whether the collective agreement under which the grievances had been filed covered both types of work. After noting that section 112a [now section 124] of the Act "...is not of general application but is restricted only to the construction industry.", the Board concluded that it lacked jurisdiction to "...act as an arbitration board with respect to matters arising outside the scope of the construction industry.".

18. *London Sandblasting, supra*, was a reference from the Minister under section 107 of the Act of a question whether the Minister had authority under section 44 to appoint a nominee to an arbitration board. The decision is of little assistance in this case because it was unnecessary for the Board to rule on the extent of its jurisdiction under section 124 in order to answer the question referred to it under section 107.

19. In *Carroll Electric, supra*, the union had applied under section 124 to have the Board arbitrate grievances about work most but not all of which pertained to the construction industry. A

different panel of the Board had found previously that the respondent employer was the successor employer under a section 63 sale of a business and was bound to the collective agreement which the union was alleging applied to all of the work about which the grievances had been filed. At the hearing, the respondent contended that the Board had "...no jurisdiction under section 124 of the Act to consider those portions of the grievances which pertain to matters outside the construction industry.". The Board ruled orally that:

...as master of its own procedure, [it] should, as a matter of labour relations policy, hear all of these grievances together in order to deal with the matters in dispute between the parties in a single proceeding. In reaching that decision, we have considered the obvious interrelatedness of the subject matter of the grievances.

The Board's analysis of section 124 and its principal reasons for that ruling appear as follows at paragraph 16 of its decision on the merits of the grievance:

Under that provision only "a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions" may refer a grievance to the Board for final and binding determination. By virtue of section 117, for the purposes of section 124 "employer" means a person who operates a business in the construction industry" (as defined in section 1(1)(f) of the Act) and "trade union" means a trade union that according to established trade union practice pertains to the construction industry." It is common ground between the parties that the applicant is a "trade union" within the meaning of section 117(f). The parties are also in agreement that the respondent "operates a business in the construction industry", although counsel for the respondent contends that the respondent also operates a business outside the construction industry. However, as noted by counsel for the respondent, the section 117(c) definition of employer is not limited to persons who operate a business exclusively in the construction industry. Moreover, all of the grievors in the present case are "employees" within the meaning of section 117(b) of the Act since all of them who are not engaged exclusively in on-site work are commonly associated in their work or bargaining with on-site employees. It is true, as submitted on behalf of the respondent, that the applicant could have referred its grievances to arbitration under the arbitration clause contained in the collective agreement (Article 20). However, that would have meant that these grievances, which primarily relate to construction work, would have been subjected to arbitration procedures of a type which have generally been recognized to be ill-suited to the needs of the construction industry (see, for example, *The Lummus Company Canada Limited*, [1976] OLRB Rep. Jan. 980). It is also true that the applicant could have availed itself of the expedited arbitration procedure provided by section 45 of the Act. However, since the majority of the work to which the present grievances relate is clearly within the construction industry, and since the grievances have unfair labour practice overtones, arising as they do from the respondent's continuing refusal to recognize the binding effect of the collective agreement upon it despite the Board's aforementioned declaration [of a sale of a business under section 63 of the Act] it was not at all unreasonable for the applicant to refer these grievances to the Board under section 124 rather than requesting the Minister to refer them to a single arbitrator pursuant to section 45 of the Act. Moreover, it is also not without significance that the respondent made no objection to the Board's jurisdiction under section 124 until the time limit set forth in section 45(2) of the Act had expired. (Article 20.02 of the collective agreement stipulates a fourteen day time limit for referring a grievance to arbitration).

[emphasis in original]

After which the Board concluded at paragraph 17 that it had "...jurisdiction to hear all aspects of these grievances under section 124 of the Act.".

20. Two different panels of the Board dealt with the section 124 referral in *Babcock and Wilcox, supra*. The decision is that of the second panel, the one which arbitrated the merits of the referred grievance. Counsel for Babcock and Wilcox had argued before the first panel that:

...section 124 is only available to employees engaged in construction work (which by statute

includes "repair"), and to the extent that the activities underlying a particular grievance are not "construction", any alleged contravention of a collective agreement must be pursued through the grievance arbitration procedure in that agreement. The respondent asserted that the expedited process prescribed by section 124 is not available, because section 124 applies only to the construction industry. If the employees are engaged in a mixture of construction and non-construction activities, that portion of their duties labelled "construction" can be pursued under section 124, but that portion classified as non-construction must follow the "private route" mandated by section 44.

[emphasis in original]

The response of that panel to counsel's argument is described in the following terms by the merits panel at paragraph 5 of its decision:

5. The earlier panel of the Board held that, at the very least, it had jurisdiction to deal with those activities which, arguably, fell within the ambit of the construction industry; however, *the Board also suggested, without finding, that if the parties to a section 124 application met a literal reading of the statutory definition of "union" and "employer" found in section 117, the Board would have jurisdiction to consider the grievance even though some of the work in question might not be characterized as construction work.* The Board suggested that so long as the applicant is a "trade union" within the meaning of section 117(f), and the employer operates a business in the construction industry under section 117(c) (albeit not necessarily exclusively so) either party may resort to the expedited arbitration procedure contemplated by section 124.

[emphasis added]

The second panel did make that finding and concluded that section 124 of the Act should be "...available to any union or employer that meets the section 117 requirements - whether or not the work in question, or some of it, is properly regarded as 'construction work'."

21. The panel's reasons for "...concluding that section 124 is broadly available to construction industry employers and unions,..." are given at paragraphs 6 and 7 of its decision:

6. In our view, the interpretation of section 124 suggested by the earlier panel is the correct one. It also makes the most "industrial relations sense". It is often very difficult to distinguish "repair" which is specifically mentioned in the definition of construction industry (see section 1(1)(f) and "maintenance" which is not - although the practice in the construction industry is to accord them separate legal treatment even when the employees or required skills may be the same. Indeed, one set of functions will often be done in close cooperation or conjunction with the other, by the same tradesman, employing the same craft skills, tools and equipment. It would make for much mischief and procedural uncertainty if a simple problem such as the non-payment of overtime had to be settled in two different forums at once, with the potential for conflicting interpretations of the collective agreement or contradictory notions about what is construction work and what is not. Furthermore, since the Ontario Labour Relations Board is responsible for interpreting and applying the special statutory framework applicable to the construction industry and, at the same time, is the designated arbitrator for collective agreements in that industry, it is both sensible and hardly surprising that section 124 is drafted broadly enough to encompass any grievance arising out of any collective agreement between a construction industry trade union and a construction industry employer. And it is the Board which has the exclusive jurisdiction to interpret and apply the complex statutory provisions which generally underlie construction industry collective agreements.

7. Does this literal application of section 124 to employers or trade unions which meet the literal terms of section 117 "open the floodgates" to claims that could not reasonably have been within the contemplation of the Legislature? Does it lead to anomalous results? We do not think so. Since unions which meet the test of section 117(f) are almost invariably craft unions confined to their historic craft units, it is most unlikely that they will have collective agreements entirely unrelated to their construction industry base. For example, it is unlikely that the Boilermakers' Union would find itself representing the clerical employees of a construction industry employer.

But even if it did, what would be the result: access to an arbitration process which is far faster and cheaper than that contemplated by most "industrial" collective agreements, with the added advantage of a Board-appointed Labour Relations Officer to assist the parties to resolve their differences without recourse to litigation. Thus, the interpretation suggested by the earlier panel of the Board is not only attractive from the perspective of labour relations policy, but also provides aggrieved parties (employers or trade unions) with an expeditious and relatively inexpensive method for resolving their disputes. When weighed against the respondent's suggestion of bifurcated proceedings and potentially competing forums, we prefer an interpretation which makes section 124 available to any union or employer that meets the section 117 requirements - whether or not the work in question, or some of it, is properly regarded as "construction work". (See, generally: *Carroll Electric*, (1982) Limited, [1983] OLRB Rep. Aug. 1282.)

22. Respondent counsel, as noted above at paragraph 14, seeks to distinguish *Carroll Electric* and *Babcock and Wilcox*, *supra*, on their respective facts and argued as well that this panel of the Board, in any event, should not arbitrate this grievance because none of the problems and potential for mischief which concerned the Board in those cases was present here. Counsel points out that, in *Carroll Electric*, the grievances and work at issue involved primarily the construction industry, there were strong overtones of unfair labour practices and the respondent had not raised its claim that the Board lacked jurisdiction to arbitrate the grievance under section 124 of the Act until the union was time-barred from applying for arbitration under section 45 of the Act. With respect to *Babcock and Wilcox*, counsel claims that the Board panel which decided the merits of the case were dealing with a question of whether the grievance was about construction industry work, or maintenance work and, therefore, not work in the construction industry. In addition, he points out that the examples of the potential for confusion that might arise if the Board interpreted section 124 as permitting or requiring the bifurcation of arbitration proceedings discussed at paragraphs 6 and 7 are not present here. According to counsel, the Board also failed to weigh the expedited arbitration provisions and the pre-arbitration settlement facilities available under section 45 of the Act when it expounded the advantages of making arbitration available under section 124. Furthermore, counsel claims that the Board's analysis of section 124 is *obiter dicta* because the first panel had decided that the Board had jurisdiction under that section to deal with the grievance. Finally, in both *Carroll Electric* and *Babcock and Wilcox*, the employers were employers in the construction industry, the trade unions held bargaining rights for the employers' construction industry employees and the parties to the grievances were bound to construction industry collective agreements which arguably covered the work underlying the grievances. The respondent, counsel contends, is not an employer in the construction industry. Therefore, to the extent that either of those decisions are read to say that section 124 has application even where the work underlying the grievance is non-construction, the Board's reasoning would not apply to the instant grievance.

23. Obviously, the Board has disagreed with counsel that the respondent is not an employer in the construction industry. The Board found at paragraph 6 that it was an employer as defined by clause (c) of section 117 of the Act. It is clear that the parties bargained a collective agreement after the applicant was certified which adopted the same generic unit description which the Board had found to be appropriate for purposes of collective bargaining. Even if the Board's unit included the respondent's installation employees (and there is no evidence before the Board either way), there is no merit in respondent counsel's argument that the Board must have concluded that they were not in construction in order for the Board to certify the applicant under the general provisions of the Act. There is nothing in evidence before the Board which would justify that conclusion. What is more significant is the fact that the parties have included within the bargaining unit adopted in the collective agreement employees classified as installer and installer's helper who do the respondent's construction industry work; that is, they are employed by the respondent under the terms and conditions of the collective agreement to install its railings in houses under construction. Thus, whether or not they were included in the bargaining unit by which the Board defined the applicant's bargaining rights at the time of its certification, the parties have agreed that the

applicant's bargaining rights include the employees who do its construction work. Therefore, the respondent is not distinguished in that respect from the employers in *Carroll Electric and Babcock and Wilcox, supra*, and it is clear that the applicant and respondent are parties which satisfy the definition of an employer and a trade union in the construction industry in section 117. They are also parties to a collective agreement which includes bargaining rights for the employer's employees in the construction industry.

24. In spite of the fact that this application and the decisions in *Carroll Electric and Babcock and Wilcox, supra*, may be distinguishable one from the other on their other facts, their important common denominator is the fact that each application involved an employer as defined in subsection 117(c) and a trade union as defined in subsection 117(f). The Board in *Babcock and Wilcox* makes it clear that those conditions are the only ones which have to be satisfied by an employer and trade union in order for one of them to refer a grievance under section 124(1) of the Act. The other conditions discussed by the Board at paragraph 6 are for the purpose of explaining the labour relations policy reasons for interpreting section 124 to be available to parties which satisfy those conditions. This panel of the Board does not understand the Board in that decision to be saying that the potential for that sort of mischief (to use respondent counsel's term) must be present before construction industry employers and trade unions can access section 124. Obviously, every grievance brought under subsection 124(1) by parties which meet its requisite conditions is not going to present the potential for the sort of mischief referred to by the *Babcock and Wilcox* panel in explaining the policy reasons for making section 124 of the Act "...broadly available to construction industry employers and unions,...". The absence of potential mischief should not be reason, however, to bar such parties from access to the advantages of arbitration under section 124, if that is the forum which they elect, just because the work underlying the grievance is not or might not be work in the construction industry. Insofar as the "floodgates" argument discussed at paragraph 7 of *Babcock and Wilcox, supra*, is concerned, whether or not this grievance is involved directly with the respondent's construction activities, it confirms the Board's prediction that unions which "...meet the test of section 117(f)..." are unlikely to have "...collective agreements entirely unrelated to their historic craft units,...". The collective agreement under which this grievance arises deals with the installation of railings in houses under construction. It cannot reasonably be said that work is unrelated to the applicant's construction industry base.

25. For all of these reasons, the Board adopts the reading given to subsection 124(1) by the Board in *Babcock and Wilcox, supra*, and finds that the Board has jurisdiction under section 124 to determine the referral of the grievance in this application. With respect to respondent counsel's argument that the Board has the discretion to refuse to entertain a referral of a grievance properly brought under section 124, even if the Board does have the discretion, it would not exercise it to refuse to entertain this grievance. It may not be a typical construction industry grievance, but the Board, having agreed for the reasons just given with the union's conclusion that arbitration of the grievance under section 124 of the Act was available to it, the Board sees no grounds in the circumstances before it which would warrant denying the union the opportunity to have the Board arbitrate the grievance.

26. The Registrar is directed to list this referral for continuation of hearing.

DECISION OF BOARD MEMBER D. A. MACDONALD; December 20, 1990

1. I do not agree with the conclusion of the majority in the instant case.

2. The grievor in this application is a shop employee, who never works outside the shop. That is he was never involved in installation work on construction sites.

3. Surely the Legislature did not contemplate the application of section 124 of the Act, to other than the construction industry, and to employees engaged in that industry.

4. I would agree with the respondent to this application, that the Board does not have jurisdiction to hear this grievance, and I would have dismissed the application.

0248-90-R Calogero Mattina, Applicant v. Labourers' International Union of North America, Ontario Provincial District Council on behalf of its affiliated Local Unions 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081 and 1089, Respondents v. Inzola Construction (1976) Limited, Intervener

Certification - Petition - Practice and Procedure - Termination - Applicant employee was petitioner in earlier certification proceeding - Whether Board discretion "to bar an unsuccessful applicant for any period from the date of the dismissal of the unsuccessful application" applies to unsuccessful petitioner bringing termination application - Act requiring Board to entertain timely termination application - Certification not prior "unsuccessful application" - Vote directed

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members, *R. W. Pirrie* and *P. V. Grasso*.

APPEARANCES: *Michael Horan* and *Calogero Mattina* for the applicant; *Elizabeth Mitchell*, *Peter Treacy* and *Bob Maskey* for the respondents; *Joseph Tascona* and *Sam Cutrazzola* for the intervener.

DECISION OF THE BOARD; December 13, 1990

1. On April 25, 1990, Labourers' International Union of North America, Ontario Provincial District Council ("the Labourers' OPDC") applied for certification as exclusive bargaining agent of labourers employed by Inzola Construction (1976) Limited ("Inzola"). One of those employees, Calogero Mattina, opposed that application. The Board found his evidence unreliable and refused to give weight to the petition he filed. On January 18, 1990, the Board granted two certificates pursuant to subsection 144(1) of the *Labour Relations Act* ("the Act"): one to the Labourers' OPDC and all of its affiliated bargaining agents for a province-wide unit of labourers employed by Inzola in the industrial, commercial and institutional ("ICI") sector of the construction industry and one to the Labourers' OPDC for a unit of labourers employed by Inzola in all other sectors of the construction industry in Board Area 8. On April 25, 1990, Mr. Mattina filed this application under section 57 of the Act for a declaration terminating the bargaining rights granted in those certificates. The application was adjourned *sine die* for a time on consent of the parties and was recently listed for hearing at the applicant's request.

2. The respondent says that it has made no collective agreement with the employer with respect to the non-ICI bargaining unit and submits that this application is therefore untimely with respect to that unit, having been made less than 6 months after certification was granted: ss. 57, 123(1) of the Act. The applicant does not dispute either the assertion or the submission. Accordingly, this application is dismissed with respect to the respondent's non-ICI bargaining rights.

3. Although the application only named the Labourers' OPDC as respondent, all of the affiliated bargaining agents of the Labourers' OPDC holding bargaining rights in the ICI sector were given notice of this application, and counsel appearing for the Labourers' OPDC confirmed that she represented all of the affiliated bargaining agents in this proceeding. The title of this proceeding has been amended to name as respondents all of the trade unions whose bargaining rights in the ICI sector are affected by this application.

4. This application was filed within the last two months of the term of the ICI sector province-wide collective agreement by which Inzola and its employees in the ICI sector became bound when the Labourers' OPDC and its affiliated bargaining agents were certified. Insofar as it affects the bargaining unit described in that agreement, the application satisfies the timeliness requirements of subsection 57(2)(a) of the Act. The respondents say that we have a discretion to refuse to entertain this application, and should exercise the application in their favour because of the short period between the date of certification and the date on which this application was filed. Their counsel argued that we get this discretion under clause 103(2)(i) of the Act or, alternately, under "the sections which allow the Board to control its own process."

5. Section 103 of the Act provides, in part, as follows:

103.-1(1) The Board shall exercise such powers and perform such duties as are conferred or imposed upon it by or under this Act.

(2) Without limiting the generality of subsection (1), the Board has the power

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(i) to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain an application by an unsuccessful applicant or by any employees affected by an unsuccessful application or by any person or trade union representing such employees within any period not exceeding ten months from the date of this dismissal of the unsuccessful application;

The Board's discretion under clause 103(2)(i) to refuse to entertain an application arises only if the person bringing the application was an "unsuccessful applicant" or any of the employees affected by it were affected by an "unsuccessful application" within the previous 10 months. It is apparent from the language of the clause that an "unsuccessful application" means an application which was dismissed, and that "unsuccessful applicant" has a corresponding meaning.

6. The previous proceeding on which the respondents rely is their certification application. That application was not "unsuccessful" in the sense intended by clause 103(2)(i), because it was not dismissed. While the applicant here was a party to the previous application, he was not an applicant; he was an opponent of the trade union's application.

7. In *Cara Operations Limited (Retail Stores Division)* (Board File #2329-84-R, decision dated June 11, 1985, unreported), a trade union applied for certification for a unit for which it had just lost bargaining rights in a representation vote conducted in a termination application brought by one of the employees in the unit. Although it was suggested that the Board could and should refuse to entertain the trade union's application, the Board there concluded that clause 103(2)(i) did not give it a discretion to do so, because there, as here, the prior application was not "unsuccessful", nor had the trade union been the applicant in the prior application.

8. In *R.L.D. Electric*, [1986] OLRB Rep. Aug. 1145, the Board dealt with a termination application filed 9 days after the disposition of proceedings in which the respondent trade union's

application for certification was granted and an employee association's application for certification by intervener was dismissed. The termination application was timely, because it had been filed in the open period of the applicable ICI provincial agreement. The Board exercised its discretion under clause 103(2)(i) to refuse to entertain the application, because it felt there had not been sufficient time for the trade union to develop a viable collective bargaining relationship. In the course of its analysis, it clearly noted (at paragraph 18) that "but for the Association's unsuccessful certification application, the Board would not have any power to refuse to entertain the termination application."

9. The Board's statutory powers to determine its practice and procedure do not give it the discretion to refuse to entertain an application which the Act requires it to entertain. Like its provisions for certification applications, the Act's provisions for termination applications are in mandatory terms. Subsection 57(3) says that "upon an application under subsection (1) or (2) the Board *shall*" make certain determinations. If it finds that not less than forty-five percent in the bargaining unit have voluntarily signified that they no longer wish to be represented by the trade union, the Board "*shall*" conduct a representation vote. If a majority of ballots cast are marked in opposition to representation by the trade union, subsection 57(4) provides that the Board "*shall*" declare that the trade union no longer represents the employees in the bargaining unit.

10. While other criteria might have been chosen and other verbal formulae might have been employed, the Legislature used very clear language in clause 103(2)(i) to describe the circumstances in which it intended that the Board have a discretion to refuse to entertain an application which it would otherwise be obliged to entertain. That language does not apply here. There is no prior "unsuccessful application." Accordingly, we do not have the discretion to refuse to entertain this application.

11. There were three employees in the ICI bargaining unit on the application date. June 4, 1990 was the terminal date fixed for this application. That is the date which we determine, under clause 103(2)(j) of the Act, to be the time for ascertaining employee wishes under subsection 57(3) of the Act. As of that date, all three of the aforesaid employees had signed a document, hereafter referred to as "the petition", stating that they no longer wish to be represented by the respondents. If we find that this document represents a "voluntary" expression of the wishes of those employees, we must direct that a representation vote be conducted.

12. As we have already noted, the applicant relied on a petition during the proceedings which led to the certification of the respondents. Those proceedings took place before another panel of the Board ("the certification panel"). As appears from the certification panel's decision of January 18, 1990 (reported at [1990] OLRB Rep. Jan. 53), that panel was at first inclined to treat that petition as voluntary, and directed that a representation vote be conducted. Before the vote was conducted, however, the panel scheduled another hearing to hear evidence that Mr. Mattina had lied to the Board when he said the petition had been prepared by his daughter and had admitted his lie in a lengthy telephone conversation with a union business agent, Ed Ferreira, after the hearing at which the vote was ordered.

13. Paragraph 13 of the certification panel's decision records that at that hearing Mr. Mattina admitted that he had lied in earlier testimony. Because of the reliance the respondents placed on the earlier proceedings, we set out here everything the certification panel had to say about the lie, the telephone conversation and the petition:

13. At the hearing, the petitioner admitted to the Board that he had lied while giving testimony under oath at the earlier proceeding. Specifically, the petitioner admitted that he had lied when he stated that his daughter wrote the petition when, in fact, the petition was written by N.

Fityani. N. Fityani was one of those initially challenged as managerial by the applicant, although that challenge was later withdrawn. The Board heard testimony from E. Ferreira, the applicant's business agent, as well as the petitioner. E. Ferreira testified as to the content of the telephone conversation with the petitioner on November 22, 1989. In addition, the Board heard a tape recording of that conversation made by E. Ferreira without the knowledge of the petitioner. The conversation lasted approximately one hour. A transcript of the tape was provided to the parties and the Board for ease of reference. Notwithstanding the petitioner's acknowledgement that he had lied to the Board and had admitted his lie to E. Ferreira in that telephone conversation and the petitioner's admission that it was his voice on the tape, the petitioner persisted in his position that some portions of the tape were omitted, that the tape was "fixed" that he was under the influence of alcohol at the time and that he had been "set up" by E. Ferreira. In this latter regard, it was also conceded by the petitioner that it was he who initiated the telephone contact with E. Ferreira.

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15. Following the evidence and representations, the Board gave the following oral ruling:

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The petitioner has admitted he lied to the Board when he testified under oath that his daughter wrote the petition. In fact, as the petitioner stated today and in the telephone conversation with E. Ferreira, N. Fityani wrote the petition. The Board further finds that E. Ferreira is a credible witness and his testimony is corroborated by the tape of the telephone conversation. Quite simply, the petitioner's assertions that the tape was "fixed" and that the initial portion of the conversation was omitted are entirely implausible. In the Board's view, the petitioner lied to the Board before (as he admitted) when he thought that was in his best interest and has not been truthful today in his attempt to explain E. Ferreira's account of the conversation and the tape. In the circumstances, the Board considers that the petitioner's explanation for the origination and circulation of the petition cannot be relied upon. As the Board noted in its oral ruling, the issue of credibility in a one-person petition is critical. At the time of the initial oral ruling, the evidence before the Board led to the conclusion that the petition was voluntary. Given the petitioner's admission that he lied and the Board's conclusions with respect to the petitioner's credibility in the proceedings today, the Board is faced with an absence of credible evidence from the petitioner. Accordingly, the Board considers that the petitioner has not satisfied the onus of establishing the petition is voluntary.

The Board, therefore, will give no weight to the petition and, given the level of membership support enjoyed by the applicant, the Board certifies the applicant for the bargaining unit set out in its earlier decision.

14. Mr. Mattina testified before us with respect to the origination and circulation of the petition filed in support of this application. He said that he was mad after the certification panel made its decision, and sought legal advice about how to deal with it. He went to his real estate lawyer, who sent him to another lawyer. He was dissatisfied with that other lawyer after dealing with him for a while, so he asked another bargaining unit employee whether he knew of a lawyer. After a couple of days, the other employee gave him the name of his present counsel. His present counsel gave him advice about instituting these proceedings, and prepared the petition document. According to Mr. Mattina, he and the other two signatories signed the document during their coffee break in a coffee shop near their work place. Mr. Mattina said no members of management were present at that time and he did not discuss the application with any member of management at any point.

15. During cross-examination of the applicant, his counsel objected to questions about the petition in the certification application as irrelevant. We do not propose to record here the precise questions objected to or the specific rulings we made. We do wish to note that in dealing with

those objections we were guided by a view of relevance which was expressed this way in *Fram Canada Inc.*, [1989] OLRB Rep. Feb. 133:

15. We have no difficulty at all with the abstract proposition that the circumstances surrounding the prior circulation of a document opposing trade union representation are relevant to the Board's assessment of the "voluntariness" of a different and subsequent document filed with the Board in connection with a certification or termination proceeding. That is not to say that the "voluntariness" of signatures on the earlier document becomes a relevant question. The voluntariness of the document filed with the Board and relied upon by the objectors is still the issue. The circumstances surrounding the earlier document are relevant only to the extent they bear on the question whether the subsequent document is reliable evidence of the true wishes of those who signed it. It is unnecessary to elaborate all the sorts of situations in which that relevance might arise. To take but one generic example, the circumstances surrounding the circulation of the earlier document might have been such as to raise in the minds of employees a reasonable perception (whether true or not) that management was somehow involved in the exercise and would learn from those circulating it the identities of those who did or did not sign it. A similar perception might then arise with respect to a subsequent document filed with the Board if those who had circulated the earlier document were responsible for circulating the document put before the Board.

16. It is not enough, however, to shift the focus of attention to an earlier document, find that it would not have been treated as reliable evidence of the wishes of those who signed it and then, by reason of some connection between the two documents, pronounce the one before the Board to be "tainted" or "infected" with the infirmities of the earlier one. The use of these words, with their connotations of disease and decay, carries with it the danger that they will become substitutes for thought. The question is not simply whether there is a connection to an earlier document with an infirmity but, rather, whether the nature of the infirmity and the nature of the connection support a conclusion that the document filed and relied upon by the objectors is not itself reliable evidence of the wishes of those who signed it.

16. During cross-examination, Mr. Mattina once again acknowledged that he had lied during the certification proceedings when he told the Board that his daughter had prepared the petition he relied upon then. He told us that he lied because he had promised Mr. Fityani not to say anything about his involvement. When it was put to him that Mr. Fityani had then been in charge of his work, Mr. Mattina said Mr. Fityani was in charge but did labourer's work too. When it was put to him that he had described Mr. Fityani as "management" and as his "super" during his telephone conversation of November 22, 1989 with Mr. Ferreira, Mr. Mattina denied calling Mr. Fityani "management", and said he could not recall calling him his "super."

17. Counsel for the respondent trade union asked for an adjournment to another day, so that it could summons Mr. Ferreira as a witness with respect to the telephone conversation of November 22, 1989. She said she had not expected that Mr. Mattina would challenge the accuracy of the transcript which had been before the certification panel and, so, had not arranged for the attendance of Mr. Ferreira who, she said, was no longer an official of the union. She acknowledged that nothing in the certification panel's decision gave any special evidentiary quality to the portion of the transcript on which she sought to rely.

18. We rejected the adjournment request. The question whether Mr. Fityani was perceived as managerial was not an unexpected or unforeseeable one which was thrust on the respondent and caught it by surprise. On the contrary, it is a question the respondent came to the Board planning to raise. It was a question with which the certification panel had not dealt. Nothing in that panel's decision could possibly have assured the respondent that the applicant would accept the accuracy of the transcript in that regard or, indeed, on any point other than the ones he conceded before that panel. Parties are expect to prepare for hearing on the assumption that they will have to formally prove every element of their case which has not already been conceded by the opposite

party. The Board does not adjourn proceedings to allow a party to repair inadequate preparation, except on consent of the other participants in the hearing. That consent was not forthcoming here.

19. Although the respondent did not summons Mr. Ferreira it did summons the two other employees in the unit. It did not call them as witnesses.

20. The certification panel made no finding that any member of management or person who might have been perceived by employee signatories to be a member of management was involved in the origination or circulation of Mr. Mattina's earlier petition. There is no evidence before us that any member of management or person who might have been perceived by employee signatories to be a member of management was involved in the origination or circulation of the petition before us. If Mr. Mattina is believed, then the petition represents a voluntary expression of the wishes of those who signed it. If that represents a change of heart by any signatory other than Mr. Mattina (who volunteered that he signed a card originally), the change was not a "sudden" one.

21. The critical question here is whether Mr. Mattina should be believed. His previous willingness to lie to the Board deserves serious consideration in assessing that question, but it is not conclusive. It certainly leads us to give Mr. Mattina's evidence much closer and more critical scrutiny than might otherwise have been the case. The legal burden on the applicant remains the same, however. The burden is the civil burden, not proof beyond a reasonable doubt. The fact that Mr. Mattina once lied in similar circumstances does not mean he lied this time. There is no evidence before us from which we can conclude that he had anything to conceal. His testimony is not at all implausible.

22. On balance, we find it more likely than not that the petition represents a voluntary expression of the wishes of those who signed it. Accordingly, we direct that a representation vote be conducted among those employed by Inzola in Ontario as labourers in the industrial, commercial and institutional sector of the construction industry. All those so employed on the date of this decision who are so employed on the day the vote is taken will be eligible to vote. Voters will be asked whether or not they wish to be represented by the respondents in collective bargaining with their employer.

23. The conduct of the vote is referred to the Registrar.

0709-89-G United Brotherhood of Carpenters and Joiners of America, Local 38, Applicant v. Marineland of Canada Inc., Respondent v. Group of Employees, Objectors

Abandonment - Bargaining Rights - Construction Industry - Construction Industry Grievance - Union certified in 1976 - No Board Report issued in late 1977 - Province-wide ICI bargaining regime imposed six months later in 1978 - Union not interacting with employer in 12 year period between No Board Report and filing of present grievance - Union attempted to organize employees in 1981 - Activity following province-wide bargaining relevant in determining whether abandonment had occurred in prior six month interval - Interval followed only by conduct demonstrating union belief it held no bargaining rights - No minimum period for finding of abandonment - Bargaining rights abandoned - Application dismissed

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *W. Gibson* and *C. A. Ballantine*.

APPEARANCES: *Douglas J. Wray* and *Art Varty* for the applicant; *Harvey A. Beresford* and *John Holer* for the respondent; *B. W. Adams* and *G. Saxton* for the objectors (May 15, 1990).

DECISION OF VICE-CHAIR, ROBERT HERMAN, AND BOARD MEMBER, W. GIBSON;
December 6, 1990

1. The name of the respondent is amended to: "Marineland of Canada Inc."
2. This is a referral of a grievance to the Board pursuant to section 124 of the *Labour Relations Act*. The applicant grieves that in April, 1989 the respondent Marineland advertised for a carpenter and did not follow the hiring hall procedures set out in the provincial collective agreement.
3. The respondent submits that the applicant no longer has bargaining rights with respect to its employees, as those bargaining rights have been abandoned. In the alternative, the respondent argues that the applicant is estopped from asserting that it has bargaining rights or that the provincial agreement applies. The instant decision deals solely with this preliminary issue.
4. The applicant submits that the respondent ought not to be allowed to assert that abandonment has occurred, because of the position it has taken in another proceeding in response to an application brought by employees to terminate the bargaining rights. In that proceeding, it did not assert that bargaining rights had already been abandoned. Having reserved on this matter at the hearing, we find that the fact that the respondent took a position in a termination application alternative to its position here does not preclude it from asserting that abandonment has occurred.
5. The applicant was certified to represent carpenters and carpenters' apprentices of the respondent in May, 1976, prior to the onset of the province-wide bargaining regime in the industrial, commercial and institutional ("ICI") sector of the construction industry. Various communications and interactions took place between the applicant, Local 38, and the respondent, from the time of certification until a No Board Report was issued on September 12, 1977, involving attempts to begin bargaining. The respondent asserts that abandonment occurred after the issuance of the No Board Report.
6. On March 3, 1978, approximately 6 months after the No Board Report, the designation order, pursuant to the amendments to the Act which created the province-wide system of bargaining in the ICI construction sector, became effective with respect to the applicant and other affiliated bargaining agents ("A.B.A.'s") and with respect to the employee bargaining agency representing those A.B.A.'s and Local 38. Even after the imposition of the province-wide scheme, Local 38 did nothing to suggest it had or was exercising its bargaining rights. To the contrary, approximately 3 years later, during the summer of 1981, Local 38's business agent, Arthur Varty, attempted to organize the carpenters (and carpenters' apprentices). He approached several employees to encourage them to join the union and sign membership cards, telling them that the union could make it difficult for them to get work if they didn't join. Unable to successfully organize the carpenters, Local 38 again disappeared from Marineland, this time for a further 8 year period. In a letter dated May 5, 1989, counsel for the applicant wrote to Marineland indicating that Local 38 was aware that Marineland had advertised for a carpenter to work for it and asserting that the provincial agreement was binding upon Marineland and that the agreement required Marineland to hire carpenters through the hiring hall. That letter also indicated that it should be treated as a grievance alleging a violation of article 5 and any other relevant provisions of the collective

agreement. The instant proceeding was referred to the Board on June 14, 1989. Throughout the entire 12 year period between the No Board issuing in September, 1977 and the grievance being filed in May, 1989, there was no interaction between Local 38 and Marineland. No evidence was led by the applicant and we therefore have been provided with no explanation for Local 38's activities (or lack thereof).

7. Marineland is a large development in Niagara Falls, over one thousand acres in size, which includes a large amusement park, a game farm, and a seaquarium, amongst other exhibits and attractions. Since its beginnings in 1961, and particularly from the time of certification in May 1976 to date, Marineland has been engaged in a constant series of construction projects, upgrading and expanding its facilities. Carpentry work was performed by the respondent from the time of certification to the time of imposition of the designation scheme in March, 1978, and generally from that time until the grievance was filed. Much of this carpentry work would have been obvious to anyone passing anywhere within the vicinity of the Marineland grounds. To take the most apparent example of the ongoing construction and the ongoing carpentry work, Marineland constructed a Dragon Mountain Ride in the central area of the grounds. Construction of this project took approximately two years, and involved the building of a man-made mountain, rising to approximately three hundred feet high and covering over 30 acres. When completed, it represented at the time the world's largest steel roller coaster.

8. It would have been difficult to have lived in the Niagara Falls area and have remained unaware of the regular construction and expansion of Marineland. The union was obviously aware when Mr. Varty approached employees of Marineland, in the summer of 1981, to seek to organize them. As it happens, Mr. Varty lived within several blocks of Marineland. Although he did not testify, the Board infers that he would have been aware of Marineland, and indeed have driven past it many times during the 13 year interval between certification and the notice of the grievance. He would have observed the building of the mountain from its early stages to completion, along with many of the other construction projects. There can be no question that during this period Mr. Varty would have been aware of the construction being engaged in throughout the Marineland complex, and the fact that carpentry work was involved in much of the construction.

9. Based on these facts, the respondent employer argues that between September 12, 1977, when the No Board Report issued, and the imposition of the province-wide bargaining scheme upon the parties in March, 1978, the applicant had abandoned its bargaining rights by its failure to take action to represent the employees in the bargaining unit, or to actively seek to bargain with the respondent. In the alternative, if the applicant had not abandoned bargaining rights by the time the province-wide scheme was imposed, it did so after the imposition of province-wide bargaining in 1978, by virtue of its inactivity and abdication of its rights during the 11 following years. Two decisions of the Board referred to were *Culliton Brothers Limited* [1982] OLRB Rep. March 357 and *Lorne's Electric* [1987] OLRB Rep. Nov. 1405.

10. Insofar as it is asserted that abandonment occurred after March 1978, counsel for the respondent argues that there is nothing in the legislation concerning the province-wide scheme of bargaining in the construction industry which precludes the Board from applying the concept of abandonment. The question of whether abandonment has occurred remains a question of fact. The Act sets up a provincial designation system, and establishes a system by which a single provincial agreement is negotiated by an umbrella employer bargaining agency and an umbrella employee bargaining agency for all constituent employers or local unions (affiliated bargaining agents) in the province. There is nothing in those provisions, submits counsel, which bars the Board from concluding that a particular local union has abandoned its bargaining rights. For example, Section 137(2) reads as follows:

(2) Where an employer is represented by a designated or accredited employer bargaining agency, the employer shall be deemed to have recognized all of the affiliated bargaining agents represented by a designated or certified employee bargaining agency that bargains with the employer bargaining agency as the bargaining agents for the purpose of collective bargaining in their respective geographic jurisdictions in respect of the employees of the employer employed in the industrial, commercial or institutional sector of the construction industry referred to in clause 117(e), except those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights.

It was submitted that this section merely deems the employer to have recognized all of the affiliated bargaining agents and the employee bargaining agency ("E.B.A.") but, on its express wording, it limits this deemed recognition "for the purpose of collective bargaining in their respective geographic jurisdictions". (In dealing with the import of section 137(2), and certain other sections of the Act relevant to the province-wide scheme, neither party relied upon the fact that some of the deeming sections were amendments to the Act (S.O. 1979, c. 113), effective as of May 1, 1980.)

11. Section 142 reads as follows:

142. Where an employee bargaining agency has been designated under section 139 or certified under section 140 to represent a provincial unit of affiliated bargaining agents, all rights, duties and obligations under this Act of the affiliated bargaining agents for which it bargains shall vest in the employee bargaining agency, but only for the purpose of conducting bargaining and, subject to the ratification procedures of the employee bargaining agency, concluding a provincial agreement.

Similarly, counsel submits, this section vests all the rights, duties and obligations of the A.B.A.'s in the E.B.A., but again for a limited purpose, the purpose of conducting bargaining and concluding a provincial agreement. It is clear, asserts the respondent, that the only bargaining rights enjoyed by the E.B.A. are bargaining rights with respect to the process of bargaining towards and the conclusion of a provincial agreement. These are the rights that the A.B.A.'s initially acquire which are deemed to transfer to the E.B.A. Counsel asserts that the E.B.A. has no bargaining rights other than those it gets from the A.B.A., and those rights are limited to the right to bargain for a provincial agreement.

12. What is not transferred to the E.B.A., submits the respondent, is the right and obligation to represent the unionized employees working for the employer in the Board area where the A.B.A. is designated to represent those employees. In counsel's submission, the right to represent the employees, to administer and to enforce the terms of the provincial agreement insofar as the local employer is concerned, rests solely with the A.B.A., in this case, Local 38. When Local 38 has conducted itself in a manner which would lead the Board to conclude it has abandoned its bargaining rights, there is no legal or national impediment to the Board so declaring, and it would both make sense and be fair to so order. Counsel submits that just as decertification only takes into account the wishes of employees working for the employer, the principle of abandonment should be applied by taking into account only the conduct of the bargaining agent (Local 38) that had the authority to represent the employees.

13. Counsel also relies upon the fact that Marineland is not a typical construction contractor, moving from project to project and site to site. Marineland is a construction employer solely

for its own purposes, which has engaged in construction on its own fixed site. It makes little sense, counsel asserts, where such a fixed site employer is concerned, for the Board to take into account either the conduct of A.B.A.'s in other Board areas, which have never and will never have any interaction with the employer or its employees, or the conduct of the E.B.A., which has no role to play with respect to the representative rights of employees, but is limited to bargaining for the provincial agreement every two years. Finally, even if the Board were to consider the conduct of the other A.B.A.'s and the E.B.A., as none of these parties have participated in this proceeding, counsel asserts that they have indicated a lack of interest in this application, and this justifies a finding that they too have abandoned their bargaining rights.

14. Some of the carpenters of Marineland appeared and participated in the proceeding and took the same position as the respondent employer.

15. The applicant argues that it has never abandoned its bargaining rights. With respect to the 6 month period prior to March 1978, the applicant submits that in all the circumstances, 6 months is far too short a period to lead to a finding of abandonment. It argues, in support of this, that no bargaining unit work was being performed during this period. (The Board has found otherwise: see paragraph 7, *supra*). Insofar as the period after March 1978 is concerned, the applicant relies upon the principles described in *Lorne's Electric* (*supra*) and argues that, on the facts, there was clearly no abandonment by the other A.B.A.'s or the E.B.A.

16. We turn first to consider whether Local 38 had abandoned its bargaining rights prior to March 3, 1978. As the question of whether abandonment has occurred is a question of fact, we must take into account all of the circumstances. See *Lorne's Electric*, (*supra*) for a discussion of the principles of abandonment. In this respect, we do not consider only the events between September, 1977 and March, 1978, in deciding whether abandonment had occurred by the latter date. Events occurring after March 3, 1978 can be relevant in assessing the meaning or effect of the union's inactivity before that date. Just as events occurring after a collective agreement has been negotiated and signed can assist an adjudicator in determining the intended meaning of particular clauses in the agreement, so too can subsequent events shed light on the question of whether abandonment had occurred by March 3, 1978.

17. After the No Board Report, Local 38 did not again interact with Marineland until 12 years later, when this grievance was filed. While we recognize the disincentive a union might have to act upon a No Board when imposition of a province-wide scheme of bargaining is imminent, the union led no evidence and therefore provided no explanation. The fact remains that Local 38 remained silent and inactive for a lengthy period even after the new scheme began to apply. The six months inactivity prior to March, 1978 can hardly be characterized therefore as a period during which Local 38 decided to suspend the assertion or enforcement of its bargaining rights on the basis that any individual action would be academic once the province-wide scheme began to apply. It can hardly be described as a temporary lull in active representation, and certainly not in the absence of any explanation. To the contrary, its complete passivity for the following 3 years, and its actions in then trying to organize the employees and obtain bargaining rights, illustrate that Local 38 conducted itself as if it had no bargaining rights.

18. There is no minimum dormant period that must pass before abandonment can be found to have occurred. For example, if weeks after a certificate issued a union unequivocally stated it had abandoned its bargaining rights, the Board might well conclude that bargaining rights had been abandoned as of that time. Any subsequent period of inactivity by the union would merely be confirmatory of the earlier abandonment.

19. It is clear that Local 38 thought it had no bargaining rights when it tried to obtain them

in the summer of 1981. We must decide whether those rights had been abandoned at some point prior to March, 1978. Six months of inactivity followed by conduct asserting bargaining rights would not, one would expect, lead to a finding of abandonment. Here the 6 months was not followed by any conduct asserting rights, but only by conduct demonstrating the belief that no bargaining rights were held. The statutory imposition of the province-wide scheme in March, 1978 does not assist us in deciding whether Local 38 had by that point already abandoned its bargaining rights. The fact remains that, after the No Board and until the grievance was filed, Local 38 acted as if it did not hold bargaining rights, and the statutory province-wide scheme does not alter this fact. Where there is such a long period of inactivity, the more reasonable inference is that the bargaining rights were abandoned at the beginning of the inactive period. The intervening organizing attempt reinforces this conclusion. In these unusual circumstances therefore, we conclude that Local 38 abandoned its bargaining rights before the province-wide scheme began to apply to it.

20. Because of this conclusion, we need not deal with the issue of whether bargaining rights were abandoned after the imposition of the province-wide scheme in 1978.

21. In the result, this application is dismissed.

(Board Member Gibson died before this decision was released. However he participated fully in the proceedings, and signed the majority decision prior to his death.)

DECISION OF BOARD MEMBER C.A. BALLENTINE, December 6, 1990

1. I dissent from the majority decision, as it applies to the Local Union abandoning its bargaining rights prior to the advent of province-wide bargaining, in the industrial, commercial and institutional ("I.C.I") sector of the construction industry.

2. I am satisfied that *Culliton Brothers Limited* (1982) *OLRB Rep. March 357* and *Lorne's Electric Limited* (1987) *OLRB Nov. 1405* continues to be good law. In this regard, I note that the majority decision does not suggest otherwise. Those cases stand for the proposition that bargaining rights in the I.C.I sector cannot be abandoned by the inactivity of a Local Union. However, notwithstanding that this remains the law, the majority still finds abandonment based only on the actions of one A.B.A. (Local 38).

3. I cannot agree with the majority decision because I cannot agree that the six month period prior to March 3, 1978 when province-wide bargaining became applicable to these parties is sufficiently long on which to conclude that abandonment has occurred. In both *Culliton Brothers Limited* and *Lorne's Electric Limited* the period of inactivity, prior to the onset of province-wide bargaining, was much longer.

4. However, as an employee representative of the Board I am troubled by the Local Union's negligence in this particular case. Carpentry work was performed at this project at Marineland in Niagara Falls Ontario from the time of certification, May 1976, to the time the grievance was filed in May 1989.

5. During this 13 year period Marineland has build many structures and a man made mountain approximately three hundred feet in height, which covers an area of 30 acres on a 1,000 acre site, all of which was publicized across the whole province of Ontario.

6. The scheme of "Province Wide Bargaining" not only has brought collective bargaining stability to the construction industry in Ontario, it has specifically benefited the International Unions by giving them a very excellent expedited process of obtaining bargaining rights through

certification, as well as maintaining those bargaining rights. It is the local union's obligation to perform their responsible duties in a prudent manner.

7. This is not the first case before this Board where the Affiliated Bargaining Agents' (Local Unions) of the (International Unions) which are part of the Employee Bargaining Agencies have been less than vigilant in the policing their bargaining rights. In *Culliton Brothers Limited* it was the Sheet Metal Workers, and in *Lorne's Electric Limited* it was the Electrical Workers.

8. In all of these cases and other similar situations, the workers' job opportunities, fair wages and working conditions have been neglected because the Unions' have failed to represent the members in a proper manner, in accordance with the scheme of province-wide bargaining.

9. In this particular situation the International Union has recently taken remedial action to correct this incident by placing the Local Union involved under trusteeship. It is hoped that this International Union and other International Unions will be more diligent in the future seeing to it that Local Unions are protecting their bargaining rights before the imposition of trusteeship becomes necessary.

2205-90-R Canadian Union of Public Employees, Applicant v. The Mississauga Hospital, Respondent, v. Canadian Union of Operating Engineers and General Workers, Local 101, Intervener

Certification - Evidence - Membership Evidence - Membership evidence challenged on basis of unspecified allegations - Board does not conduct examinations where no specific or explicit allegations of non-pay or non-sign

BEFORE: Bram Herlich, Vice-Chair, and Board Members W. A. Correll and D. A. Patterson.

DECISION OF THE BOARD; December 12, 1990

1. The name of the respondent is amended to read: "The Mississauga Hospital".
2. This is an application for certification.
3. The applicant has requested that a pre-hearing representation vote be taken.
4. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in the voting constituency hereinafter described were members of the applicant at the time the application was made.
5. Having regard to the agreement of the parties, the Board directs that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:

all employees of the respondent in Mississauga, Ontario employed as stationary engineers in the boiler room of the hospital and persons primarily engaged as their helpers, save and except the chief and persons above such ranks.

Although this voting constituency differs marginally from the bargaining unit description found in the collective agreement between the respondent and the intervener, the parties agree that the voting constituency (which appears to be in greater conformity with standard Board bargaining unit descriptions) covers the very same employees as the description found in the collective agreement.

6. All those employed in the voting constituency on December 6, 1990, who are so employed on the date the vote is taken will be eligible to vote.

7. Voters will be asked to indicate whether they wish to be represented by the applicant or the intervener in their employment relations with the respondent.

8. The Labour Relations Officer's report indicates the incumbent challenges the Form 9 declaration and the collection of the membership evidence and will provide the Board with written particulars by December 10, 1990 and requests the ballot box be sealed pending the outcome of an inquiry.

9. After office hours on December 10, 1990 the Board received a fax transmission from the intervener as follows:

Dec/10/90

RE: File #2205-90-R

Canadian Union of Public Employees; and Mississauga Hospital; and Canadian Union of Operating Engineers and General Workers, Local 101.

Further to this unions allegations challenging the Form 9 declaration and challenge of the collection of the membership evidence, we state the following:

1. The applicant's collection process involved the submission of membership cards and moneys' through the mail. No questions were asked as to the origin of the one dollar (\$1.00) prescribed for collected.
2. The collectors were not present during the filling in of information and collection of the one dollar fee. The cards were countersigned although not at the time of collection.
3. The Form 9 declaration did not make sufficient enquiries as to ascertain that the process had been followed correctly and truthfully and therefore did not have sufficient "personal knowledge" to make the Form 9 declaration.
4. The Form 9 declarant has been misled by the collectors as to the process carried out during the signing and filing of the cards submitted to support the unions application.
5. The union requests the "board" to conduct an investigation into the above matters and allegations with respect to the following cards submitted:

[name deleted by the Board]
[name deleted by the Board]
[name deleted by the Board]
[name deleted by the Board]

6. The union further requests the Board to inquire as to the process of collection carried out by [name deleted by the Board] and [name deleted by the Board].

Also attached to the transmission were the following documents:



Canadian Union of Public Employees

RECEIPT FOR INITIATION FEE

OCT 1961

Received from _____
Institution Fee _____

GROWTH AND DEVELOPMENT OF THE COTTON PLANT

Partenariat électronique

Printed on Union Made recycled paper



**APPLICATION FOR MEMBERSHIP IN
Canadian Union of Public Employees**

PLEASE COMPLETE OTHER SIDE

- a. Apply for membership in the above union and agree to abide by its constitution and by-laws;
 - b. Herby tender \$... 1.00 ... as payment of the initiation fee.
 - c. Authorize the union to be my exclusive bargaining agent.

Signed 

On behalf of the above mentioned Union, I hereby accept this application and acknowledge receipt of \$.100 as payment of the Initiation fee.

Signed on behalf of the Union.

Date
L1-K

Printed on Union Watermarked Paper

三

S A M P L E

HERE'S A CARD THAT MEANS A 'GOOD DEAL' FOR YOU
AND YOUR FAMILY

TO BECOME A MEMBER OF CUPE, COMPLETE THE ATTACHED 'APPLICATION FOR MEMBERSHIP CARD' AND RETURN IT WITH YOUR DOLLAR* IN THE POSTAGE PAID PRE-ADDRESSED ENVELOPE PROVIDED FOR THAT PURPOSE...

COMPLETE BOTH SIDES OF THE WHITE CARD IN THE FOLLOWING MANNER...

THE RECEIPT PORTION OF THE CARD WILL BE PROCESSED BY AN AGENT OF CUPE AND YOUR RECEIPT WILL BE REMITTED TO YOU.

 Canadian Union of Public Employees	
RECEIPT FOR INITIATION FEE	
Date	10/1/89
Received from	Initiation Fee.
<input checked="" type="checkbox"/> "X" YOUR SIGNATURE <small>Printed on Union Watermarked Paper</small>	
 APPLICATION FOR MEMBERSHIP In Canadian Union of Public Employees	
I the undersigned: <ol style="list-style-type: none"> Apply for membership in the above union and agree to abide by its constitution and by-laws; Herby tender \$ <u>1.00</u> as payment of the initiation fee; Authorize the union to be my exclusive bargaining agent. 	
Signed <u>"X"</u> YOUR SIGNATURE <small>Printed on Union Watermarked Paper</small>	
On behalf of the above mentioned Union, I hereby accept this application and acknowledge receipt of \$ <u>1.00</u> as payment of the initiation fee. <small>Printed on Union Watermarked Paper</small>	
Signed _____ on behalf of the Union. <small>Printed on Union Watermarked Paper</small>	
Date <u>11-1-K</u>	

CANADIAN UNION OF PUBLIC EMPLOYEES
 PHONE NO. AREA CODE 416-292-3999

* THE LAW REQUIRES THAT YOU PAY THE INITIATION FEE OF \$1.00 AS PROOF OF YOUR SERIOUS INTENTION TO BE A CUPE MEMBER.

10. As the intervener has made no specific or explicit allegation of non-pay or non-sign, the Board does not see any purpose in conducting its own examination into the allegations.

11. To the extent that the allegations challenge the propriety of membership evidence collected by mail, the parties attention is directed to the Board's decision in *Fontenac-Lennox and Addington County Roman Catholic Separate School Board*, [1988] OLRB Rep. Sept. 888 and the cases cited therein at paragraph 4. We note that the Form 9 filed by the applicant contains no information regarding collection of membership evidence by mail.

12. In view of the allegations filed, the Board directs that the ballot box containing the ballots cast in the representation vote directed herein be sealed and the ballots not be counted until the parties have been given full opportunity to present their evidence and make their submissions.

13. Should the intervener, or any other party, wish to make further submissions or request a hearing in this matter, they should do so in the manner prescribed by section 70(2) of the Board's Rules of Procedure. In the absence of any request for a hearing, the Board may dispose of the matter on the basis of the material before it.

14. The matter is referred to the Registrar.

0822-90-G Ontario Allied Trades Construction Council and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicants v. Electrical Power Systems Construction Association and Ontario Hydro, Respondents

Construction Industry - Construction Industry Grievance - Discharge - Grievor discharged for insubordination shortly after hiring - Board considering appropriateness of "progressive discipline" in construction industry - Board unwilling to substitute lesser penalty under circumstances - Grievance dismissed

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *G. O. Shamanski* and *H. Peacock*.

APPEARANCES: *David Watson, Max McDavid and Douglas Gavin* for the applicants; *Robert J. Atkinson and Vello Medin* for the Respondents.

DECISION OF THE BOARD; November 26, 1990

I

1. This is a referral to arbitration made pursuant to section 124 of the *Labour Relations Act*. Douglas Gavin ("the grievor") contends that he has been discharged without just cause. Mr. Gavin's employment was terminated on September 20, 1989, because he refused to perform certain work to which he was assigned. Ontario Hydro asserts that the grievor was insubordinate, and that discharge is warranted in the case of a construction worker who had only been on the site for about two weeks. The grievor replies that this work refusal was motivated solely by a concern for his health and that, in any event, discharge is a gross over-reaction.

2. A hearing in this matter was held in Toronto on November 15, 1990. The parties were agreed that the Board should deal only with the question of liability; that is, whether there was "just cause" for the grievor's termination, and whether the Board should exercise its discretion to substitute some lesser penalty. The employer reserves its position that even if the grievor had not been discharged on September 20, he would have been permanently laid-off on December 21, along with the rest of his crew. Accordingly, the parties are agreed that the Board should remain seized of the remedy issue, including any questions of mitigation or quantification.

3. This case turns largely on credibility. In considering that matter, the Board has taken into account such factors as: the demeanour of the witnesses when giving their evidence, the clarity, consistency, and general plausibility of that evidence when subjected to the test of cross-examination, the ability of the witnesses to resist the tug of self interest or self justification in shaping their answers, the extent to which the witnesses were either forthright or evasive when answering pointed questions, and what appears to us to be most probable in all the circumstances. On that basis, we prefer the evidence of Ron Lukes, the grievor's foreman, wherever that evidence is in conflict with that of the grievor. In particular, we prefer Mr. Lukes' recollection of the events precipitating the grievor's discharge.

II

4. The grievor is a truck driver. He was first employed by Ontario Hydro, on a sporadic basis, in the early 1980's. From 1985 to 1989 he worked elsewhere. In the Spring of 1989, however, he reactivated his union membership and was once again referred, through the hiring hall to Ontario Hydro.

5. The grievor worked from mid May to early July in Hydro's lines and stations division. After a short lay-off, he was referred through the hiring hall to the Bruce Nuclear Generating Station. The relevant collective agreement permits a limited "carry over" of service credits, so that at the time of the grievor's discharge, he had a seniority rating of about two months. However, he had only been working at the Bruce site for about two weeks.

6. The grievor's work referral slip requires him to state "any serious illness, operation or injury and physical limitation". Under that heading the grievor has listed "none". The grievor maintains that this form was typed by the union dispatcher, however, we are satisfied that the grievor himself was the source of this information. Accordingly, there was no reason for Hydro to suspect that the grievor was ill or unable to perform the regular duties of a truck driver. Those duties include the occasional maintenance and servicing of vehicles.

7. The grievor testified that in late August he was experiencing abdominal pain as a result of a condition that his doctor tentatively diagnosed as either "diverticulitis" or "colonitis". Indeed, the grievor missed his first scheduled workday because of a doctor's appointment. The grievor testified that he explained the reason for his absence to Mr. Lukes, the following day. The grievor asserts that Mr. Lukes knew about his health condition and knew that it might interfere with his ability to do his job.

8. We do not accept this submission. We are satisfied that the grievor did tell Lukes about the doctor's appointment, but no details were given, nor did the grievor suggest that his ailment might interfere with the performance of his regular duties.

9. On the morning of September 20, the grievor had no driving assignment, so Lukes asked him to repair a damaged truck tire. There is no dispute that this is a heavy and unpleasant

task, however, the grievor concedes that drivers are expected to do such work from time to time. This was the grievor's response to Mr. Lukes' request:

“you can send me home or fire me because I'm not changing tires; I did too much of that before when I was there”.

The latter part of this retort refers to the grievor's past experience at Ontario Hydro when, as the “junior man”, his foreman regularly required him to repair truck tires. The grievor believes that these unpleasant duties should be allocated on the basis of seniority. There is nothing in the collective agreement requiring it, nor is it Mr. Lukes' practice. Lukes told the Board that he assigns spare drivers whatever work is available, and on September 20, a tire required repair. The grievor also believes that Mr. Lukes was acting unfairly, had singled him out, and took a certain pleasure in assigning him heavy work. There is no basis for this belief, although it does explain the grievor's reaction.

10. Following the grievor's outburst, Lukes brought the matter to the attention of the general foreman. Not surprisingly, the general foreman treated the grievor's behaviour as unwarranted insubordination. To that point, there had been no mention of the grievor's health or any medical reason for his work refusal. The general foreman decided to terminate the grievor's employment.

11. The termination documents were given to the grievor a few minutes later. The grievor responded with something about his health condition, but he was not very specific and from Lukes' perspective it was too late anyway since the discharge decision had already been made. Mr. Lukes testified that he did not pursue the grievor's reference to an illness because he did not believe that to be the grievor's real reason for his work refusal. Neither do we. Having heard the grievor's evidence in this regard, we are satisfied that the grievor was refusing to work because the job was unpleasant, he believed that he had been unfairly singled out, and he thought that the work should have been given to a junior employee. The alleged concern about his health was an *ex-post-facto* rationalization. The grievor knew that employees with health problems could be assigned to light duties, because he had taken advantage of that opportunity in the past. Against that background, we find it particularly significant that the grievor voiced no health concerns in the first instance.

12. Counsel concedes that the grievor refused to work and specifically invited the employer to discharge him, however he argues that, in all the circumstances, discharge is “unjust”. The grievor had a good reason for his work refusal, and his only default was in not revealing his illness earlier. Counsel points out that the grievor is a good worker, and pursuant to the terms of the collective agreement, has about two months seniority. Counsel urges the Board to exercise its equitable jurisdiction under section 44(9) of the Act to substitute a written warning or suspension for the discharge.

13. We decline to do so.

14. This matter comes before us pursuant to section 124 of the Act, which is confined to construction industry collective agreements. In the construction industry, employment relationships are transitory and, as in the present case, workers are typically referred from the hiring hall and employed for short periods of time without the kind of pre-employment scrutiny that would be undertaken by an industrial employer. Construction industry collective agreements do not have stipulated probationary periods for assessing the suitability of new workers nor the express right, (common in industrial agreements) to release probationers without cause. Construction employers take what the union sends, but, by the same token, it is understood that if the new employee “does not work out”, he is terminated (“laid-off”) and returns to the hiring hall for reassignment. In the

construction industry the notion of "progressive discipline" is very much attenuated (see *Comstock International Limited*, [1987] OLRB Rep. May 667; *Canadian Engineering and Contracting Co. Limited*, [1983], OLRB Rep. July 1017, and *Re: Harold R. Stark et al*, [1972] 1 LAC (2d) 406 (Egan)).

15. Against this background we think it would come as something of a surprise to the industry if the Board were persuaded to introduce the notion of "progressive discipline" and substitute some lesser penalty, in the case of a new employee, who had been on site for only two weeks, who refused without excuse or explanation to perform a reasonable task, and who even invited his employer to discharge him. The incongruity of applying "progressive discipline" is highlighted by the fact that there probably is no job to which the grievor might now be reinstated, and if, through the hiring hall, he is referred back to Ontario Hydro, the employer may be obliged to rehire him in any event (see the observations of the Board in *Ontario Hydro*, [1983] OLRB Rep. Jan. 99 at paragraphs 32-40).

16. For the foregoing reasons, this grievance is dismissed.

3043-89-R Ubaldo Marcheschi on his own behalf and on behalf of a group of employees, Applicant v. International Union of Operating Engineers, Local 793, Respondent v. Ottawa Greenbelt Construction Limited, Intervener

Termination - Practice and Procedure - Reconsideration - Representation Vote - Union requesting reconsideration of order for representation vote - Union alleging employer gerrymandered voter list - Allegations, even if true, irrelevant to Board's determination - Adequate protection against gerrymandering through segregated ballot process - Application dismissed

BEFORE: N. B. Satterfield, Vice-Chair, and Board Members M. Rozenberg and A. Hershkovitz.

APPEARANCES: George Rontiris and Ubaldo Marcheschi for the applicant; Gary Caroline, Len Budge and Rick Kerr for the respondent; W. T. Langley, Natale Giust and B. Ingmundson for the intervener.

DECISION OF N. B. SATTERFIELD, VICE-CHAIR, AND BOARD MEMBER M. ROZENBERG: December 19, 1990

1. This is a request by the respondent International Union of Operating Engineers, Local 793 ("the union") made through its counsel, for reconsideration of the Board's decision in this application which issued November 19, 1990. The decision directed that a representation vote be taken of the employees of the intervener in the bargaining unit for which the union holds bargaining rights. The vote was to allow the employees to indicate whether they wish to be represented by the union in their employment relations with the intervener.

2. The request was made by letter dated December 11, 1990 from counsel for the union. The grounds for reconsideration are included in the following paragraphs of that letter:

Subsequent to the release of this decision, information has come to the attention of the respon-

dent which leads it to believe that the intervener has engaged in unlawful conduct in an attempt to gerrymander the list of eligible voters in this matter.

The facts upon which the respondent relies are outlined in a complaint pursuant to section 89 of the *Act* being filed this day.

Based on the facts as alleged in the companion section 89 Complaint, the respondent requests that the Board exercise its discretion pursuant to section 106 of the *Act* and reconsider its decision to order a representation vote in OLRB File No. 3043-89-R.

3. The Board's policy respecting applications for reconsideration is clearly enunciated in its Practice Note #17. Generally, the Board restricts reconsideration to those situations in which the party seeking reconsideration intends to adduce new evidence or make representations which it had no previous opportunity to raise. See *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Feb. 185 at paragraph 4. The Board may also consider whether it should vary or revoke a decision where significant issues of Board policy are raised. See *John Entwhistle Construction Ltd.*, [1979] OLRB Rep. Nov. 1096 at paragraph 5.

4. The facts on which the union relies in support of its request for reconsideration are set out in Schedule "A" to its complaint under section 89 of the Act in Board File No. 2424-90-U. Those facts are events which are alleged to have taken place on November 16, 23, 26 and 27, 1990. As noted above the Board's decision issued on November 19, 1990. Apparently they represent the new evidence which the union would be seeking to adduce should the Board hold a hearing into its request. Neither the complaint nor the letter setting out the request for reconsideration relate those events to the events which were material to the application and to the Board making its vote direction. While the events go to the union's allegation that the intervener has been attempting to gerrymander the list of eligible voters, even if they are assumed to be true, they have no direct application to the matters which were before the Board in the application for termination of bargaining rights.

5. Insofar as there is an allegation that the intervener is gerrymandering respecting the list of eligible voters, the Board's process for making the arrangements for and conducting the vote provides adequate protection without any need for the Board to reconsider and vary or revoke its decision. Any person who claims he/she is eligible to vote, or any person whom one of the parties claims is eligible or not eligible to vote, will be given a segregated ballot, if he/she appears to vote. In addition, the Registrar may direct that the ballot box be sealed pending further direction of the Board. If it remains necessary after the vote to decide the eligibility to vote of persons who cast segregated ballots, the Board will make that decision after receiving the representations of the parties and before directing the counting of ballots.

6. Therefore, in the Board's view, the request for reconsideration does not reveal any new evidence or representations which the union had no previous opportunity to raise. Nor does the request identify any compelling labour relations policy concern which would be served by reconsidering the Board's decision. Therefore, given the importance of finality, the Board declines to exercise its discretion pursuant to subsection 106(1) of the *Labour Relations Act* to reconsider its decision of November 19, 1990.

DECISION OF BOARD MEMBER A. HERSHKOVITZ: December 19, 1990

1. I dissent.

2. The request for reconsideration should be decided by the Board only after the complaint under section 89 of the *Labour Relations Act* has been determined, and the referral of a

grievance under section 124 of the Act, if one is made pursuant to the undertaking in respondent counsel's letter.

1600-90-R United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463, Applicant v. P.H. Atlantic Plumbing & Heating Division of 629629 Ontario Limited, Respondent

Certification - Natural Justice - Reconsideration - Employer alleging it did not receive timely notice of certification application - Employer disputing facts relating to notice and posting on which decision based - Board directing listing for hearing on matters raised

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Kurchak*.

DECISION OF THE BOARD; December 7, 1990

1. The name of the respondent is amended to read: "P.H. Atlantic Plumbing & Heating Division of 629629 Ontario Limited".

2. The Board has received a request to reconsider its decision dated October 9, 1990. That request is made by counsel for the respondent in a letter dated November 8, 1990. It was opposed by the applicant in a letter dated November 21, 1990. The Board does not propose to set out the lengthy submissions received from both parties.

3. The substance of the submissions supporting the request for reconsideration is based on the fact that the respondent asserts that it did not receive timely notice of the application for certification and was therefore unable to prepare a timely reply or provide proper notice to employees who might be affected by the application.

4. The respondent through its counsel asserts that it did not receive from the Board Forms 77, 78, 74, 81, Schedules to Form 77 and the notice entitled "Notice to Employees" ("the appropriate documentation") until October 1, 1990. It is further asserted that this documentation was not "brought to the attention of management until October 2, the terminal date". As a result, the notices were not posted until October 2, 1990 and were then only posted "in the shop located at its [the respondent's] head office" because "... there was no opportunity to post at the various construction sites in the province at which employees were working ...".

5. The respondent did not file a timely reply and schedules, and did not return Form 74, the Return of Posting Card. Counsel for the respondent in his letter to the Board states that the respondent posted the notices on October 2, 1990 and mailed the Return of Posting Card. The Board notes that it has not received any Return of Posting Card from the respondent. The Board further notes that it did not receive a reply from the respondent or a list of employees until it received this reply for reconsideration on November 9, 1990.

6. We note that at the time of our decision dated October 9, 1990, this panel of the Board had received a duly completed "advice of posting" card, from the applicant. On that card Mr. Larry Cann, a representative of the applicant states that he had "ascertained from employees

affected by this application that the Notices to Employees (Form 78) were posted by the employer on September 27, 1990." We also note that the records of the Board indicate that the appropriate documentation was sent to the respondent at its proper address at 3206 Wharton Way, Mississauga, Ontario by Quick Messenger Service (Ontario) Ltd. on September 25, 1990 and was received at that address on that day as evidenced by a signature on the consignee portion of the receipt bill.

7. On October 9, 1990, the Board therefore dealt with the application on the basis of the evidence before it and without a hearing pursuant to section 102(14) of the *Labour Relations Act*.

8. In its request for reconsideration the respondent asserts that at the time we made our decision the facts were not as indicated in paragraph 6 herein. The respondent asserts it received the documentation from the Board on October 1, 1990 and not September 25, 1990 as indicated by the Quick Messenger Service receipt, and asserts that the notices were posted on October 2, 1990 and not September 27, 1990 as indicated on the advice of posting card returned by the applicant.

9. Under these circumstances the Board directs that this matter be listed for hearing. The purpose of the hearing is to hear the evidence and representations of the parties in respect of the matters raised in the request for reconsideration.

1191-89-U Antoine A. Plennevaux, Complainant v. Labourers International Union of North America, Local 1036, Respondent

Duty of Fair Referral - Unfair Labour Practice - Complainant was listed higher than other referred workers, but not listed as having necessary skills for the job - Referral system putting onus on members to notify union of skills - Complainant not notifying union - Failure of union to inquire whether complainant had necessary skills no breach of duty of fair referral - Complaint dismissed

BEFORE: Judith McCormack, Vice-Chair.

APPEARANCES: Yvon Renaud for the complainant; S.B.D. Wahl and J. Lewis for the respondent.

DECISION OF THE BOARD; December 10, 1990

1. The name of the respondent is amended to read: "Labourers International Union of North America, Local 1036".

2. This is a complaint in which Antoine Plennevaux alleges that the respondent union violated section 69 of the *Labour Relations Act* on May 1, 1989 by failing to issue a work referral slip to him with respect to a job with City Block Masonry Limited ("City Block").

3. At the time of these events, City Block was a masonry contractor working under a subcontract with The Matthews Group, the general contractor with respect to the construction of a treatment centre in Sault Ste. Marie. City Block and the respondent union are bound by a collective agreement between the Employer Bargaining Agency - Labourers, the Labourers Interna-

tional Union of North America and the Labourers International Union of North America, Ontario Provincial District Council (the "provincial agreement") dated the 16th day of May, 1988.

4. On April 19th, 1989 a pre-job conference was held with respect to the masonry construction at the treatment centre project. This meeting was attended by the respondent's business manager Jimmy Lewis, the respondent's president Bill Suppa, Rick Emsley, one of the principles of City Block, and his general manager. Mr. Emsley had a masonry crew stationed in London, Ontario, and sought the respondent's agreement to transfer the entire crew to the treatment centre site. This request was made under Article 3.02(a) of the provincial agreement which reads as follows:

3.02(a) It is hereby agreed by and between the parties to this Agreement that a request by a contractor for mobility of key men shall be discussed at a job conference. Such request shall not be unreasonably denied.

5. The London crew were members of the Labourers International Union of North America, but in a different local. Mr. Suppa expressed some skepticism about the entire crew qualifying as key men under this provision, and Mr. Lewis told Mr. Emsley that the respondent would not agree to the transfer because there were too many local members out of work. After a lengthy discussion, Mr. Lewis and Mr. Suppa agreed to allow Mr. Emsley to bring in two key men from the London crew. One of these men was described by Mr. Emsley as a zoom boom operator and the other was identified as a lead hand. Part of the agreement was that these men would have to obtain transfer cards from their local in London, and then attend at the respondent's office to sign up and complete the paperwork with the respondent. After this they would be issued referral slips to the treatment centre project. The remainder of the crew for the treatment centre project was then to be made up from the respondent's list of out-of-work members. Mr. Emsley advised the respondent at that time that he would need mason tenders for the rest of the crew.

6. During the last week of April, at the request of City Block, the respondent referred three mason tenders to the treatment centre site. These individuals were selected because they were the first three mason tenders on the respondent's out-of-work list. At the time the complainant, who is not entered on the list as a mason tender, was higher on the list than one of the men referred to the site.

7. During that same week, Mr. Suppa became aware that there were two men from London working for City Block on the treatment centre site. They had not presented transfer cards, signed up or obtained referral slips from the respondent. As a result, Mr. Suppa attended at the site and insisted that they leave. Sometime towards the end of that week the complainant went to the site and spoke to Mr. Emsley with respect to working for City Block. Mr. Emsley told him to report for work on Monday, May 1st.

8. When Mr. Plennevaux attended at the treatment centre site on May 1st, Mr. Emsley took him and three men from London down to the respondent's office at approximately 8:30 a.m. Since the office was closed, Mr. Emsley brought the men back to the work site where they commenced working. At 9:00 a.m., Jodie Devoe, the respondent's chief steward on the site, noticed Mr. Plennevaux and asked him for his referral slip. Mr. Plennevaux said that he did not have a slip and that he would be getting it later. The three men from London also did not have referral slips. Two of them were the ones whom Mr. Suppa had insisted be removed from the site the week before. Mr. Devoe called Mr. Suppa and advised him of this, and Mr. Suppa told Mr. Devoe to send them all down to the respondent's office.

9. At approximately 9:30 a.m., Mr. Emsley, the three men from London, and Mr. Plenne-

vaux arrived at the respondent's office. Mr. Suppa directed the London men to Roberta Peron, the respondent's office secretary, to complete the necessary paperwork for their transfers. In the meantime, he and Mr. Plennevaux discussed his situation. Mr. Plennevaux said to Mr. Suppa "you caught me, Billy, you can't blame me for trying". This was apparently a reference to the respondent's by-laws which prohibit members soliciting work on their own, rather than being referred by the respondent. Mr. Suppa and Mr. Plennevaux talked about the fact that Mr. Plennevaux was not supposed to be soliciting work, that he knew better, and that he knew the proper way to go about it. At this point, Ms. Peron came to Mr. Suppa and told him that there were three men wishing to transfer from London rather than two. Mr. Suppa then spoke to Mr. Emsley and pointed out that they had agreed that two men would be allowed to transfer in, that he didn't care which two they were, but that there would only be two. He then went and spoke to Mr. Plennevaux again while two of the three men from London filled out all the papers and deposited their transfer cards. When this was done, Mr. Suppa instructed Ms. Peron to issue referral slips to them.

10. During this period of time at the office, Mr. Suppa received a call from Stone and Webster Limited, another masonry contractor, requesting three cement finishers for the next morning. However, the caller from Stone & Webster advised him that if one of the cement finishers was Mr. Plennevaux, the company did not want him. Mr. Suppa replied that if Mr. Plennevaux was one of the first three cement finishers on the list, he would be referred. However, he asked why the company did not want Mr. Plennevaux. The reason given related to lay-off in 1985 where it is alleged Mr. Plennevaux threatened to kill a number of people in the company.

11. Mr. Suppa then ascertained that the next three cement finishers on the out-of-work list included Mr. Plennevaux. He told Mr. Plennevaux that he was going to send him to Stone and Webster. However, if the company refused to hire him, Mr. Suppa instructed him not to argue or "threaten to blow up Algoma Steel" but rather to simply come back and Mr. Suppa would see if he had a grievance. He then instructed Ms. Peron to make out a referral slip for Mr. Plennevaux for Stone and Webster.

12. Stone and Webster did indeed refuse to hire Mr. Plennevaux. The respondent filed a grievance on Mr. Plennevaux's behalf, which was settled in August of 1989 in a manner involving the payment of \$3,000.00 from Stone and Webster for Mr. Plennevaux. Mr. Plennevaux subsequently filed this complaint.

13. Counsel for the complainant agreed that his client's referral to Stone and Webster and the events following that referral were not the subject of the complaint. Rather, it was the respondent's treatment of Mr. Plennevaux prior to the Stone and Webster referral, and in particular, the failure to refer him to the City Block site which he alleged constituted a violation of section 69.

14. Section 69 provides as follows:

69. Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.

15. The Board has said that section 69 does not in itself require that hiring halls be operated on the basis of strict "first in, first out" referrals from the out-of-work list, nor does it preclude the use of discretion on the part of union officials in making referrals (*Maurice Berlinquette*, [1986] OLRB Rep. Feb. 194; *John Cooper*, [1984] OLRB Rep. Jan. 6, and *Raphael A. Julien*, [1985] OLRB Rep. April 537). As a result, the mere fact that Mr. Plennevaux was higher on the list than one of the men referred to City Block in the last week of April does not necessarily point to a violation of section 69. Rather, we must examine the respondent's referral system and determine

whether either the system or its application in this case is arbitrary, discriminatory or involves bad faith.

16. The respondent's referral system is based on the use of a computer to compile and update the out-of-work list and to ascertain the positions of members on that list. A number of precautions have been taken to ensure the integrity of the system, including the automatic logging into the computer of telephone calls made to members for job referrals. In this regard, the computer records the time of calls, the name of the employer and the category of work. If the member declines the work, the reason is also recorded. It was agreed by the parties that there are a number of specialized skills within the designation of labourer, and that it was important that the respondent refer people for jobs skilled in those specialities where requested. The reasons for this from the point of view of the union include the nature of the particular skills necessary and the protection of work jurisdiction by the union. From the point of view of employers, referring individuals by skill increases productivity and reduces the need for on the job training. The collective agreement in its wage provisions and other appendices and schedules contemplates quite a number of these sub-categories, including mason tender and cement finisher.

17. Mr. Suppa and Mr. Lewis testified that when a request came in for a particular speciality, they would obtain a listing from the computer showing the first people on the out-of-work list who had those skills. Members are entitled to list up to three specialities next to their names in the computer system. If they possess more skills than that, this can be noted by an entry which refers the inquirer to the member's individual file. It was not disputed that it is the responsibility of each member to ensure that their skills or classifications are listed and kept up to date, and indeed, this is specifically set out in the respondent's by-laws. Members may check the out-of-work list at any time during office hours. Mr. Plennevaux is listed on the computer as a cement finisher, and as having a surveying certificate. He is not listed as a mason tender.

18. Mr. Lewis and Mr. Suppa testified that to become listed as possessing a particular skill, a member must either have a government certificate of qualification or letters from employers indicating that the individual had performed this work. It was not suggested that Mr. Plennevaux had submitted such material. Indeed, Mr. Plennevaux testified that he had never asked the union to be considered for mason tender jobs. Since 1973 when Mr. Lewis became the business manager of the respondent, Mr. Plennevaux has never been dispatched as a mason tender. It appears that Mr. Plennevaux was familiar with the system because when he obtained his surveying certificate, he went to the respondent and requested that this qualification be listed beside his name, which the respondent did.

19. There is nothing about this system in itself which can be considered arbitrary, discriminatory or indicative of bad faith. The calling up of names from the list by skill as well as list position is a rational approach, and there was no dispute about either the reasons for referring members in this manner or the importance of those reasons. In addition, the evidence indicates that City Block requested three mason tenders, that the first three mason tenders on the list were referred, and that Mr. Plennevaux is not listed, nor has he made any attempt to be listed, as a mason tender. In these circumstances, the mere fact that Mr. Plennevaux was higher on the out-of-work list than one of the men referred does not demonstrate a violation of section 69.

20. Counsel for the complainant asserts that in light of the fact that Mr. Plennevaux and the third London man were employed by City Block, the company must have needed two more men from the hiring hall on May 1st. He argues that Mr. Suppa should have inquired of Mr. Emsley with respect to the company's needs when he came down to the respondent's office, and then ascertained from Mr. Plennevaux whether he could perform the work. Instead, counsel claims that

these considerations were overshadowed because Mr. Suppa preferred to chastise Mr. Plenneaux for soliciting his own work. Mr. Suppa's failure to make these inquiries is alleged to be a violation of section 69.

21. I observe at the outset that there is no evidence that City Block requested additional members on May 1st to replace either the third London man or Mr. Plenneaux. Given the wide range of options available to an employer with respect to the deployment of manpower, I am not prepared to conclude that City Block requested additional referrals in the face of sworn testimony to the contrary. Neither can it be said Mr. Suppa was guilty of wrongdoing by not making inquiries of Mr. Emsley in this regard. The collective agreement between the parties sets out in detail how employees are to be hired, and includes the following paragraphs:

ARTICLE 3 - HIRING OF EMPLOYEES

3.01 "The following provisions will apply to the hiring of all Employees except as specifically provided for elsewhere in the Master Portion, Trade Appendices and Local Schedules."

(a) The Employer agrees to call the Local Union by 1:00 p.m. for its needed supply of men for the following day. All Employees hired through the Union shall present to the Employer a referral slip from the Union prior to commencing employment. It is understood that if the Local Union having jurisdiction over the work is unable to provide the required men within 24 hours the Employer is free to hire such labour as is available, but such labour shall acquire a referral slip, prior to commencing work on the second day after hiring, and as a condition of employment, either be in good standing or apply for membership in the Union within seven (7) days.

The Local Unions shall be allowed forty-eight (48) hours to supply men to jobs beyond thirty (30) road miles from the point of origin as defined in Schedule "B" hereto.

(b) The Employer shall have the right to name hire one foreman per project, providing such foreman is a member in good standing of the Local Union having jurisdiction over the area and the employee is registered on the Local Union unemployment list.

22. In light of such specific terms, Mr. Suppa was entitled to rely on Mr. Emsley requesting all the referrals he needed, and he was not required by section 69 to make any additional inquiries. Similarly, there was no onus on Mr. Suppa under section 69 to ask Mr. Plenneaux what work he could perform. Certainly if the respondent is going to refer members based on skill as well as their list position, there must be some method for ascertaining those skills. However, in this case, the respondent's method was to hold members responsible for notifying the union of their skills. As noted earlier, Mr. Plenneaux was quite aware of this process as he had used it himself, and it is stated clearly in the respondent's by-laws that "each member shall be responsible to have their skills or classifications listed and kept up to date". In addition, the parties agreed upon this fact. It seems safe to assume that members themselves are in the best position to know their own skills and any changes in this regard. Moreover, there were over 300 people on the out-of-work list at the time. Considering the number of members involved and the nature of the information required, the respondent's method of ascertaining skills was a reasonable one, and in light of the fact that it was set out in the by-laws and known to Mr. Plenneaux, Mr. Suppa was entitled to rely on it. In these circumstances, section 69 cannot be read as imposing a duty on Mr. Suppa to make inquiries of Mr. Plenneaux.

23. Much of Mr. Plenneaux's evidence seemed to relate to the proposition that he could in fact perform work as a mason tender. I do not find this particularly helpful. If the respondent's system for ascertaining members' qualifications and subsequently referring them on that basis does not violate section 69, as I have found, the real question is whether Mr. Plenneaux informed the respondent of his skills. Since he did not seek to have himself listed as a mason tender, it is hardly

surprising that he was not referred as one, and whether he could actually perform such work does not shed much light on whether the respondent's conduct was illegal.

24. Finally, I do not find that Mr. Suppa's chastisement of Mr. Plennevaux reflects any animosity towards the latter, or dominated Mr. Suppa's conduct toward him. By soliciting his own work, Mr. Plennevaux had broken one of the respondent's by-laws, and it is readily apparent that if such a practise were to become widespread, the respondent's hiring hall would become undermined to a very significant degree. There was no evidence that Mr. Suppa's reaction was excessive, or indeed anything more than simple irritation. Not only did he immediately refer Mr. Plennevaux to Stone and Webster when the request for cement finishers came in, but the respondent filed and pursued a grievance on the complainant's behalf when Stone and Webster refused to hire him. There is nothing about these events which suggests that the respondent acted towards Mr. Plennevaux in a manner that was arbitrary, discriminatory or indicative of bad faith.

25. The evidence before me indicates that there has been no violation of section 69. This complaint is dismissed.

2148-89-U; 2182-89-R United Brotherhood of Carpenters and Joiners of America, Complainant v. Repla Limited, Respondent; United Brotherhood of Carpenters and Joiners of America, Applicant v. Repla Limited, Respondent

Certification - Certification Where Act Contravened - Discharge - Discharge for Union Activities - Interference in Trade Unions - Unfair Labour Practice - Union supporters discharged during organizing campaign - Union having sufficient membership support for representation vote - Discharges likely to have had chilling effect - Vote not likely to show true wishes - Certificate issuing - Reinstatement, compensation, and posting orders made

BEFORE: Judith McCormack, Vice-Chair, and Board Members D. G. Wozniak and D. A. Patterson.

APPEARANCES: David Watson, J. Kouba and R. Balkissoon for United Brotherhood of Carpenters and Joiners of America, Local 27 and United Brotherhood of Carpenters and Joiners of America; C. E. Humphrey and C. Shimmell for the respondent.

DECISION OF THE BOARD; December 12, 1990

1. This is a complaint under section 89 of the *Labour Relations Act*, together with an application for certification in which the applicant has invoked section 8 of that Act. In addition, the employee status of two individuals is in dispute.

2. By a decision in this matter dated May 1, 1990, the Board found that the applicant was a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in the Regional Municipality of Durham, save and except forepersons, persons above the rank of forepersons, students employed during the school vacation period, persons

employed for not more than 24 hours per week, office and sales staff and security guards, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on December 18, 1990, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. This would entitle the applicant to a representation vote, but not to certification without a vote. It is apparent that this situation would not be affected by the dispute with respect to the status of the two individuals. As a result, it was necessary to hear and determine the request for certification under section 8, and the incidents described in the section 89 complaint which formed the basis of that request.

5. At the outset of the hearing, the applicant indicated that an error had been made in setting out its own name in the section 89 complaint and requested leave to amend it accordingly. While initially the respondent opposed this request, the Board decided that the complaint and the application would be heard together in any event and that the parties could pursue this matter in final argument if it was still in dispute. The parties elected not to address the matter in final argument, and as a result, we are prepared to grant the applicant's request. The style of cause on the section 89 complaint is amended so that the name of the complainant reads as follows: "United Brotherhood of Carpenters and Joiners of America".

6. The respondent is a window manufacturer who currently employs approximately 22 people in the bargaining unit described above. On September 13th of 1989, one of the locals of the present applicant ("Local 27") applied to be certified as the bargaining agent for this unit. A terminal date of September 28th was set and a hearing was scheduled for October 13th. At that hearing, a differently constituted panel of the Board extended the terminal date which had the effect of making a petition opposed to the union timely. In addition, a non-pay allegation was made with respect to the membership evidence filed. On October 20th, the matter came back on for hearing and the parties agreed that the Board should direct a representation vote. That vote was held on November 3rd and Local 27 lost, 9 votes to 11, with 2 spoiled ballots. Philip Adams, one of the grievors listed in the complaint, attended the two hearings on behalf of the union and was Local 27's scrutineer and agent for the count at the vote. Harry Nokes, the other grievor, was a vocal supporter of Local 27's application. As is its usual practice when a vote has been held, the Board imposed a six month bar on an application for certification by Local 27.

7. Immediately thereafter, the applicant commenced its own organizing campaign. Ron Balkissoon, an organizer for the applicant, met with four employees including Mr. Adams and Mr. Nokes within several days of the vote. Mr. Nokes and Mr. Adams were given cards for signing up employees and they commenced to do so. They themselves signed cards on November 7th, and on the morning of November 8th Mr. Nokes obtained the signature of another employee on a card.

8. Later on November 8th, Mr. Nokes was given a letter of warning by the respondent indicating that he had until November 10th to show he was capable of handling his job. On November 9th, Mr. Nokes was terminated. Before he left the plant that day, he gave his blank cards and the one he had collected to Mr. Adams. On November 20th, Mr. Adams was terminated. The applicant alleges that Mr. Nokes and Mr. Adams were fired either in retaliation for their activities with respect to the Local 27 campaign, or to "nip the applicant's campaign in the bud". The respondent asserts that Mr. Nokes was fired because he was not a good employee, and that Mr. Adams was laid off for lack of work.

9. Subsequently on November 24th, Mr. Balkissoon met with the other two employees who informed him that they could not get any more cards signed. Mr. Balkissoon testified that he himself went to the homes of two employees who declined to sign cards. One of these employees had signed a card previously in the Local 27 campaign. No cards were collected after this point and on November 30th, the applicant filed this application.

10. The respondent initially objected to the applicant's application on the basis that the applicant and Local 27 were essentially one and the same for all practical purposes, and that this application was barred by the Board's previous order with respect to Local 27. A differently constituted panel of the Board found that they were separate and distinct entities both legally and in other respects, and determined that this application would proceed.

11. Section 8 provides as follows:

8. Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

There are three elements to this provision:

- (a) The employer must have contravened the *Labour Relations Act*.
- (b) The effect of that contravention must be that the true wishes of employees are not likely to be ascertained through the Board's usual methods of assessment such as membership evidence or a representation vote.
- (c) The applicant must have membership support adequate for collective bargaining.

12. The applicant alleges that the terminations of Mr. Nokes and Mr. Adams violated sections 64, 66 and 70 of the *Labour Relations Act*. As a result, we must turn first to an examination of those terminations.

13. Mr. Nokes was hired on August 1st, 1989 to be the lead hand for a new line of three windows that the respondent was developing. Mr. Nokes had never made windows before. At that time, Peter Hanzel, the respondent's material manager, told him that there was a probationary period of three months. It appears that Mr. Nokes had completed his probationary period shortly before he was terminated.

14. Mr. Nokes' duties included learning how to make the new windows himself so that he could train others, setting up the department, and organizing the work of other employees when the department became fully staffed. From the time he was hired until the week ending October 21st, his work consisted of familiarizing himself with the three new windows, organizing the physical layout of his department, making production prototypes and producing initial samples of the new windows. He was also assigned to other departments in that period to obtain more experience with other types of windows. Employees were gradually brought in to the new department, and it was fully staffed by the week ending October 28th.

15. Mr. Hanzel described three reasons for Mr. Nokes' termination. Firstly, from the time

the department was in full operation in the week of October 28th until the week of November 4th, productivity in the department was very low. He and Adolph Schneulle, the plant manager, discussed this problem, and on November 8th went over production reports. They were concerned about an upcoming major project, the Palazzo Towers order, which would require a large number of the new windows. They did not think that they would be able to handle this at the department's then current productivity rate. Secondly, Mr. Hanzel had received complaints about Mr. Nokes' work from Mr. Schneulle between two and three times a week commencing shortly after the time Mr. Nokes started work with the respondent. Thirdly, Mr. Nokes misdrilled a window which resulted in the November 8th warning letter referred to earlier which reads as follows:

As Lead Hand it is imperative that you have a complete knowledge of the product your department is producing. Your performance in the past and again with the window today indicates that you do not.

You have had 3 months to familiarize yourself with the product. It is now your last chance, you have until Friday to show you are capable of handling this job.

16. However, as noted earlier, Mr. Nokes was in fact fired on Thursday, November 9th. According to Mr. Hanzel, this was because he had made another error in placing the locks incorrectly on two large windows. His termination letter reads as follows:

This is to advise you that your employment with Repla Limited is terminated effective Friday, November 10, 1989.

Our intention was to develop you in the position of lead hand for our new vinyl window line but, after your trial period, we found your knowledge of the new vinyl window was still minimal leading us to believe the position is beyond your capabilities.

Enclosed is:

1) regular pay up to and including November 10, 1989

- 2) one week's pay in lieu of notice to November 17, 1989
- 3) vacation pay up to and including November 17, 1989
- 4) record of employment
- 5) OHIP record

We are sorry this position did not develop to our mutual benefit.

Mr. Hanzel testified that he was unaware that Mr. Nokes was involved in union activity, and indeed that he was unaware of the applicant's campaign until he received the section 89 complaint.

17. Mr. Schneulle told the Board that three weeks after Mr. Nokes was hired, he began to hear complaints about his work. After one month, he began directly observing his work, and testified that Mr. Nokes had cut window profiles inappropriately, drilled holes in the wrong places and assembled profiles badly. He asserted that he had spoken to Mr. Nokes about this on a number of occasions, and said that although Mr. Nokes seemed very keen to learn, he felt that he wasn't really listening to him, and his performance did not improve. Mr. Schneulle commented that Mr. Nokes' work was untidy, that he hadn't set up his department properly, that he himself was disorganized, and that he did not organize the work of other employees well. However, he agreed in cross-examination that all machinery and work tables were in place in the department before Mr. Nokes started work, that he was told not to move them, and that the department was small and crowded.

18. Mr. Schneulle told the Board that Mr. Nokes had made a large number of minor mis-

takes during the time he worked for the respondent. The only specific ones that he could remember were the drilling and lock placement mistakes that lead to his letter of warning and his letter of discharge respectively, and several incidents in which he had mounted glazing bridges incorrectly. It is not disputed that Mr. Nokes received no written warnings or notations until the letter of November 9th.

19. Initially, Mr. Schneulle testified that the warning letter was prompted by the locks being placed incorrectly, and that nothing had happened in terms of Mr. Nokes' conduct between the time of the warning letter and the time of the termination letter that caused him to terminate Mr. Nokes. Rather, he said, the termination letter came about because he discussed the situation with H. W. Peterson, the respondent's president, and that Mr. Peterson had made the final decision to let Mr. Nokes go immediately.

20. Mr. Schneulle completed his examination-in-chief before the lunch break. After the break, counsel for the respondent advised the Board that Mr. Schneulle had indicated to him that he had made a mistake in his testimony. The Board allowed Mr. Schneulle to continue his examination-in-chief as the applicant's counsel had not yet begun to cross-examine him. Mr. Schneulle then testified that the letter of warning had been prompted by drilling mistakes and that the dismissal decision was made after Mr. Nokes attached the locks incorrectly. Mr. Schneulle also said that he never knew Mr. Nokes was involved in the union. However, he admitted in cross-examination that he had commented to Mr. Nokes upon his wearing a union T-shirt, and he told the Board that no one else was wearing a union T-shirt. This incident occurred approximately a week before Mr. Nokes was terminated.

21. Mr. Nokes told the Board that at 11:30 a.m. on November 9th, he approached Mr. Schneulle because he wanted to know what Mr. Schneulle's intentions were as a result of the warning letter. He testified that he thought that Mr. Schneulle had already made up his mind to terminate him. Mr. Schneulle told him that it would be better if Friday was his last day, and that he could find another job. Mr. Nokes worked until just before lunch. Then Mr. Schneulle told him that he had talked to Mr. Peterson and they had decided it would be better if he left right then and there. As a result, Mr. Nokes went to talk to Mr. Hanzel to arrange for his separation papers. He then went to talk to Philip Adams in the roof window department, and gave Mr. Adams the card that he had collected on November 8th and the extra cards that were blank. While he was talking to Mr. Adams, Mr. Hanzel and Mr. Schneulle approached him and escorted him off the premises.

22. Sections 64, 66, 70, and 89(5) of the *Labour Relations Act* provide as follows:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;

- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

89.-(5) On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

23. In the *Barrie Examiner*, [1975] OLRB Rep. Oct. 745, the Board set out its approach to cases such as this where section 89(5) applies:

17. What then is the extent of the burden of proof that has been shifted by statute to the respondent? The Act speaks of the burden of proof "that any employer...did not act contrary to this Act". In its earlier decisions, this Board has stated that, even if only one of the reasons for a discharge related to union activity, the discharge would nevertheless constitute a violation of the Act. For a review of this jurisprudence, see *Delhi Metal Products Ltd.*, [1974] O.L.R.B. 450. In other words, the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct. This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

24. Subsequently, the Board reiterated in *The Corporation of the City of London*, [1976] OLRB Rep. Jan. 990 that the anti-union motivation does not have to be the sole reason, or even the predominant reason for the activity complained of to violate the Act, so long as it is one of the reasons. Then in *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299, the Board described the difficulties inherent in this kind of proceeding:

5. In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti-union conduct and any other "peculiarities". (See *National Automatic Vending Co. Ltd.* case 63 CLLC 16,278). If, having regard to the circumstantial evidence, the Board cannot satisfy itself that the employer acted without anti-union motivation, the Board must find that the employer has violated the Act. These determinations, however, are most dif-

ficult and require an incisive examination of all the evidence. Not only must the Board "see through" the legitimate reasons which often co-exist with the unlawful, but at the same time the Board must be capable of distinguishing between the unlawful and the unfair. The Board cannot find, and neither should it automatically infer, that an employer who has engaged in conduct which is unfair has violated the Act even if the unfair treatment is coincidental with an organizing campaign. However, because of the nature of the proceedings and the frequent requirement for inferential reasoning the Board would be delinquent if it did not consider, for purposes of drawing an adverse inference, unfair treatment during an organizing campaign of itself or in conjunction with the other circumstantial evidence. The Board, therefore, must be acutely sensitive to all of the circumstances and must not be unduly swayed by either the co-existence of unfair treatment or by the co-existence of legitimate reasons for the employer's conduct in determining if The Labour Relations Act has been violated.

25. With this in mind, there are a number of things that concern us about the sequence of events before us. Firstly, it is difficult to accept both that Mr. Nokes was such a poor worker and that his deficiencies were evident so soon after he commenced employment for the respondent when he was not terminated until after the completion of his probationary period. Since there was no collective agreement, there was nothing which necessarily required the respondent to terminate Mr. Nokes during his probationary period or that prevented his termination subsequently. However, we find the fact that he was only terminated after he started recruiting employees for membership in the applicant tends to cast doubt on the assertion that he was discharged because of his work performance.

26. In addition, there is some conflict in the evidence as to why Mr. Nokes was terminated. Mr. Hanzel emphasized the productivity problem in his evidence and submitted computer print-outs in evidence showing that productivity was low for the two and a half weeks before Mr. Nokes' discharge. The reports also indicated that productivity rose significantly after Mr. Nokes' termination. There was no dispute that this subsequent rise was unknown to the respondent at the time of Mr. Nokes' termination, and therefore was not a factor in its decision. However, we also found this material of little assistance for other reasons, including the fact that the productivity figures used were calculated by dividing the number of hours worked by the windows produced to obtain a figure of hours worked per window. After Mr. Nokes was terminated, Mr. Schneulle took over the supervision of the department. However, the hours he spent organizing and supervising the department were not included in the productivity figures, unlike those of Mr. Nokes. This in itself would result in a significant reduction in the tabulation of hours worked per window and an apparent rise in productivity. Moreover, this was a new department which had only been fully staffed with employees who were themselves unfamiliar with the new window line for approximately two and a half weeks before Mr. Nokes was terminated. Mr. Nokes testified that it took almost a week to train employees on the new window line, and that there were a number of problems initially relating to machinery and the lack of work space. In these circumstances, it would not surprise us if productivity was low at the beginning, and rose as employees became more familiar with the work and the problems in the system were ironed out. As a result, the respondent's conclusions with respect to Mr. Nokes seem somewhat premature. Of course, we are not dealing with the fairness of Mr. Nokes' discharge since that is not the issue before us. However, the weakness of the productivity justification advanced by the respondent tends to undermine its credibility.

27. Mr. Schneulle, on the other hand, emphasized Mr. Nokes' mistakes as the reason for his termination. However, as noted earlier, his initial testimony was that a misdrilling mistake prompted the letter of warning, and that it was a discussion with Mr. Peterson which resulted in the termination letter. This is consistent to some extent with Mr. Nokes' account. Mr. Schneulle's subsequent testimony is more consistent with Mr. Hanzel's evidence. We note that neither the letter of warning nor the termination letter provide us with much assistance on this point, as both are very general.

28. Mr. Schneulle testified that Mr. Peterson made the final decision to terminate Mr. Nokes' employment, that he did not know whether the termination letter was written by Mr. Peterson or by the respondent's Personnel Department in Oakville, and that he could not say why it did not refer to the lock placement mistake which was said to have prompted it. Mr. Peterson himself did not testify in this matter. In our view this is a serious problem. As noted earlier, the Board must be satisfied both that the reasons advanced for the discharge were the only reasons, and that those reasons were free of anti-union animus. It is very difficult, if not impossible, to be satisfied in this respect if the individual who made the final decision does not testify with respect to what his reasons actually were.

29. In addition, as the Board pointed out in *Burlington Air Express (Canada) Ltd.*, [1987] OLRB Rep. Aug. 1056, the failure of a critical witness to testify may result in an inference that such testimony would not have been helpful to the respondent. In this regard, the Board has adopted the following passage from the headnote of *Holmes v. Alexon*, (1975) 7 O.R. (2d) 11, in *McGregor Hosiery*, [1976] OLRB Rep. Oct. 583; *B & S Furniture Manufacturing Limited*, [1980] OLRB Rep. May 645 and *Burlington Air Express, supra*:

Where a party or witness fails to give evidence which was within his power to give and by which relevant facts might have been elucidated, the court is justified in drawing the inference that the evidence which might have been given would have been unfavourable to the party to whom the failure is attributed.

The failure of Mr. Peterson to testify is all the more troubling in light of our concerns about the other evidence with respect to Mr. Nokes.

30. There is also some discrepancy in the evidence about the warning letter. Mr. Schneulle agreed in cross-examination that he normally dealt with employees orally, and not in writing. As the Board observed in *Pop Shoppe, supra*, a departure from the norm may be subject to greater scrutiny in these circumstances. In addition, Mr. Hanzel testified that if Mr. Nokes had simply continued performing as he had been until then, but had avoided making mistakes, he would have been "okay", and that it was because of the second mistake that he was terminated. In contrast, Mr. Schneulle said in his evidence that Mr. Nokes had made so many mistakes by the time he made the drilling error that he had decided it was time for a final warning. He told the Board that on Wednesday he hoped that there would be a "miraculous" change in Mr. Nokes by Friday. This seems to be unrealistic, at the very least. In these circumstances, and having regard to the timing of the warning letter, the short deadline in it and the discharge of Mr. Nokes before that deadline, it is difficult to avoid the conclusion that a decision had already been made to terminate Mr. Nokes at the time the warning letter was issued. If this is so, it tends to cast doubt on the reasons advanced by Mr. Hanzel and subsequently by Mr. Schneulle as to what prompted the discharge letter, that is, the lock placement error. This doubt, coupled with Mr. Peterson's failure to testify, reinforces our other concerns about the motivation for Mr. Nokes' discharge. Finally, we find that Mr. Schneulle's assertion that he was unaware of Mr. Nokes' support for the union to be somewhat implausible in light of the fact that he admits commenting on the union T-shirt Mr. Nokes was wearing.

31. Looking at the evidence as a whole, we are not satisfied that the respondent's reasons for terminating Mr. Nokes were entirely free of anti-union motivation. As a result, we conclude that the respondent violated section 66 of the *Labour Relations Act*. In addition, by discharging one of the applicant's in-plant organizers, the respondent interfered with the selection of a union or the representation of employees by a union, contrary to section 64.

32. Turning next to Mr. Adams' termination, Mr. Hanzel testified that Mr. Adams was

hired on April 10th, 1989 and that he worked in the roof window department until his termination. The reason for that termination was lack of work. According to Mr. Hanzel, during the winter the respondent usually experienced a lull in orders which had been previously compensated for by the "Nicholson order" of 200 to 250 windows. During the week prior to November 20th, Mr. Hanzel testified that Mr. Peterson had called him and told him that the respondent would not be receiving the Nicholson order this year. At that point, there were approximately 215 roof windows in inventory, and the respondent expected to sell a minimal number of them over the winter. As a result, the roof window department was closed that week, and the other people were transferred out.

33. Mr. Adams was the only one in the department whose employment was terminated. Indeed, Mr. Hanzel testified that he was the only employee who had ever been terminated or laid off as a result of a shortage of work in the four years that he had been the material manager. In re-examination he explained this by saying the respondent had never lost the Nicholson order before, and that in previous years, many employees from the east coast had taken long winter vacations which had obviated the necessity for layoffs.

34. Mr. Adams was not the most junior employee in either the plant or the department. Rodney Dalton, an employee in the roof window department who was hired after Mr. Adams but who had worked previously for the respondent, had been transferred out several weeks previously. According to Mr. Hanzel, he was transferred partly in anticipation of the seasonal slowdown and partly because the respondent needed someone in shipping and receiving with forklift experience. Both Mr. Dalton and Mr. Adams had had some experience in shipping and receiving, although Mr. Dalton appears to have had more, and Mr. Adams' experience involved using a sideloader. Both a forklift and a sideloader are used in the respondent's shipping and receiving department. Mr. Hanzel agreed that it was well-known that Mr. Adams was a union supporter. In contrast, Mr. Dalton appeared at the hearing on Local 27's application with two other objecting employees in opposition to Local 27's certification bid.

35. The other two people in the department at the time of Mr. Adams' termination were John Young and Audrey Wry. Mr. Young was the lead hand, and he remained in the department making roof windows as required. Ms. Wry was transferred to another department during the week of November 20th, where she was described on Mr. Hanzel's print-outs as being in training.

36. Mr. Hanzel indicated that he was initially planning to see if Mr. Schneulle could absorb Ms. Wry, Mr. Young and Mr. Adams on the Palazzo Towers project, but that he did not discuss it with Mr. Schneulle because Mr. Peterson told Mr. Hanzel that they had decided to terminate Mr. Adams' employment. Mr. Schneulle testified that Mr. Adams was not transferred into another department because in his view he could not perform the work of other departments. He told the Board that roof windows were the simplest windows to assemble and that Mr. Adams' work was unsatisfactory on a previous occasion when he had worked in another department. Mr. Adams testified that this involved one period of two weeks when he was transferred to the wooden glider department to replace two employees on vacation, that not only was he expected to do the work of two employees but that he received no training or familiarization period with respect to the glider windows. In addition, he told the Board that no-one had mentioned to him at the time that there were problems with his work.

37. Mr. Hanzel agreed that he told Mr. Adams the week before he was terminated that he would give him a merit increase now that the union had been defeated. He also agreed that Mr. Adams had a perfect attendance record and that he was never late. Mr. Schneulle on the other hand testified that he was often late.

38. In the weeks subsequent to Mr. Adams' termination, the documentary evidence ten-

dered by the respondent indicates that the hours worked by employees actually increased, although not in the roof window department. Mr. Hanzel explained this by saying there was an increased volume of work because the respondent was trying to get orders finished before Christmas.

39. There was no discussion of a possible recall on November 20th and Mr. Adams' record of employment indicated that he had been terminated. However in April of 1990, some three months after these proceedings were initiated, the respondent sent Mr. Adams a letter purporting to recall him. Mr. Adams contacted Mr. Schneulle at that time and told him that because his papers had said he was terminated, he had found another job. Mr. Schneulle indicated that the company had made a mistake. However, Mr. Adams declined to return to work for the respondent. (At the hearing, his counsel indicated that he was no longer seeking to be reinstated to employment with the respondent.) Although the recall letter indicates that order levels were up in the roof window department, the respondent did not hire anyone else when Mr. Adams did not return to work. Mr. Schneulle explained this by saying that although roof window orders were up at the time of the recall letter, they subsequently dropped again.

40. Mr. Schneulle testified that he had no knowledge Mr. Adams was involved in the union. He agreed, however, that he had heard from other employees that Mr. Adams was distributing union T-shirts after the Local 27 vote. Mr. Adams told the Board that he had been active in the campaigns of both Local 27 and the applicant. As noted earlier, he attended the Local 27 hearings and was the scrutineer and agent for the count on the representation vote. After the vote he distributed union T-shirts for the applicant, spoke to employees about signing membership cards and collected several cards. He also told the Board that he could perform work in any of the plant's departments, although it appears from his testimony that the roof window department is more isolated from the rest of the plant and that there is less interchange between it and other departments. However, Mr. Hanzel testified that the respondent tried to cross-train employees so that they could move between jobs, and it is apparent that Mr. Dalton and Ms. Wry were absorbed into other departments.

41. We have several concerns about the circumstances of Mr. Adams' termination as well. In the first place, the evidence about who made the actual decision to terminate Mr. Adams is unclear. Mr. Schneulle said initially that he made the decision to lay off in consultation with the Personnel Department, and that the suggestion to let Mr. Adams go in particular came from the Personnel Department, on the grounds that he was the last person hired for the roof window department. Then Mr. Schneulle said that he had called Mr. Peterson, and that Mr. Peterson had consulted with Mrs. Shimmel of the Personnel Department. Later he testified that he himself had been the one to raise Mr. Adams' name. Mr. Hanzel said that Mr. Peterson had told him about the decision. In examination-in-chief Mr. Schneulle emphasized that Mr. Adams was terminated because he could not perform work in other departments, while in cross-examination he stressed that it was because Mr. Adams was the last person hired for the roof window department. As noted earlier, Mr. Dalton was hired after Mr. Adams.

42. This confusion is compounded by the fact that Mr. Peterson did not testify. Our concerns set out earlier in this regard apply to some extent here as well. Without his testimony both the reasons for Mr. Adams' termination and the decision-making process as a whole remain, at the very least, unclear.

43. In addition, those reasons which have been advanced for Mr. Adams' discharge are not particularly credible. If the only reason for Mr. Adams' termination was lack of work, and it was anticipated that he would subsequently be recalled, we are hard-pressed to understand why both

his record of employment and his discharge letter describe this event as a termination rather than a layoff. We note as well that the termination letter refers to the fact that the respondent "is closing down the roof window line due to lack of orders". This is inconsistent with both his recall letter which refers to roof window order levels increasing, and the undisputed evidence that Mr. Young continued to make roof windows up until at least the point at which Mr. Schneulle testified in these proceedings.

44. The fact that Mr. Adams was a well-known union supporter, that he was the only person laid off, that a layoff was such an unusual event and that Mr. Dalton who had publicly opposed Local 27's application was transferred rather than laid off despite the fact that he was hired after Mr. Adams are all troubling as well. We do not find the evidence with respect to Mr. Adams' skills in the wooden glider department or the loss of the Nicholson order satisfactorily explains this questionable set of circumstances. Indeed, if Mr. Adams' work was so poor in that department, we find it interesting that he had been promised a merit increase the week before his termination. The fact that he was working in a different department at that point does not entirely allay our concerns in this regard. Even the manner of his termination, on a Monday morning part way through his shift, seems a little unlikely if the decision had been made the week before, and if it was based on a seasonal lull coupled with the loss of the Nicholson order. Finally, we find it difficult to believe Mr. Schneulle's assertion that he did not know Mr. Adams was involved with the union, despite Mr. Adams' high profile on the Local 27 application, the fact that Mr. Schneulle had heard he was distributing T-shirts after the vote and in light of Mr. Hanzel's evidence that Mr. Adams was well-known as a union supporter.

45. For all these reasons, we are not satisfied that the termination of Mr. Adams was entirely free from anti-union motivation, and we conclude that the respondent breached sections 64 and 66 in this respect as well. We do not find it necessary to consider the applicant's claim that both terminations violate section 70, as it does not add to our analysis of the case nor does it affect possible remedies.

46. We now turn to the applicant's request under section 8. As a result of our finding with respect to the respondent's contraventions of sections 64 and 66, the first element of section 8 has been met. We must now consider whether those contraventions mean that the true wishes of employees are not likely to be ascertained by the Board's usual methods of assessment.

47. The Board has found on quite a number of occasions that the discharge of union supporters has meant that employee wishes are not likely to be subsequently ascertained. (See, for example, *Dylex Limited*, [1977] OLRB Rep. June 357; *Riverdale Frozen Foods Limited*, [1979] OLRB Rep. April 338; *The Globe & Mail*, [1982] OLRB Rep. Feb. 181; *Elbersten Industries Limited*, [1984] OLRB Rep. Nov. 1564; *Zest Furniture Industries Limited*, [1987] OLRB Rep. Feb. 299, and *Zenith Wood Turners Inc.*, [1987] OLRB Rep. Nov. 1443.) As the Board noted in *DI-AL Construction Limited*, [1983] OLRB Rep. March 356:

A discharge is one of the most flagrant means by which an employer can hope to dissuade his employees from selecting a trade union as their bargaining agent. The respondent's action in discharging Mr. Holland because of his support for the union would have made it clear to employees the depth of the respondent's opposition to the union and likely have created concerns among them that if they were also to support the union, it might jeopardize their own employment. In the face of the discharge I doubt that the employees would now be able to freely decide for or against trade union representation. This is particularly so given the small size of the bargaining unit and the respondent's earlier conduct. In these circumstances, I am satisfied that because of the respondent's unlawful conduct, the current true wishes of the employees are not likely to be ascertained in a representation vote. Accordingly I am of the view that the applicant should be certified pursuant to the provisions of section 8 of the Act.

48. In this case, the message that would be conveyed to employees by the respondent's conduct is that supporting the applicant was not conducive to continued employment. This goes directly to the economic dependency which is the core of an employee's vulnerability in the workplace. Although the applicant has sufficient membership support to entitle it to a representation vote, at this point such a vote is more likely to test employees' views on retaining their jobs, rather than their views on unionization.

49. Similarly, we are concerned that the level of membership evidence before us does not represent the true wishes of employees. Because of the identification of Mr. Nokes and Mr. Adams with the applicant's campaign and the timing and circumstances of their terminations, we have little difficulty in concluding that those terminations would have had a chilling effect on the applicant's organizing drive. It is true that several cards were signed after Mr. Nokes' discharge. However, the numbers indicate that the momentum of the campaign had dropped off, and only one card was signed after Mr. Adams' termination. Of course, there is always the possibility of other reasons for this drop in employee interest. On the other hand, we find it difficult to accept that it was simply a coincidence that the campaign ran out of steam after Mr. Adams' termination. Any employees who might have given the respondent the benefit of the doubt with respect to Mr. Nokes' termination would likely have concluded otherwise when subsequently Mr. Adams, another union activist, was terminated, and Mr. Dalton, a union objector, was retained.

50. Among other things, counsel for the respondent pointed to the level of membership evidence submitted in Local 27's application and the results of Local 27's vote, and suggested that the level of membership evidence in this application is so similar as to allow us to conclude that it really is representative of employees' views on unionization.

51. The problem with this argument is that it relies on the proposition that Local 27 and the applicant are one and the same, a proposition which the Board rejected in its earlier decision, (now reported as *Repla Limited*, [1990] OLRB Rep. May 612). In that decision, a majority of the panel noted that the Board had treated parent unions and local unions as separate and distinct entities for a considerable period of time, and that each can establish status as a trade union under section 1(1)(p) of the *Labour Relations Act*. In addition to this legal distinction, the Board observed that "there may well be political and financial differences which would be significant to employees in choosing between a parent union and one of its locals as the organization which they wish to have undertaken obligations under the *Labour Relations Act* as their bargaining agent." Finally, the Board commented that the evidence before it did not support the proposition that the applicant was an "alter-ego" of Local 27, or Local 27 in disguise.

52. In these circumstances, we are not prepared to conclude that either the membership evidence filed in Local 27's application or the results of the vote reflect employees' views on representation by the applicant. The Board does not assume that the wishes of employees with respect to one union entity are the same as their views on another union entity. The best example of this is the Board's practise to bar only an unsuccessful applicant from bringing another certification application for six months after losing a vote. Since other unions are free to apply, it is evident that the Board recognizes that employees may reject one union and embrace another. As a result, the membership evidence and the vote results relating to Local 27's application are of little value to us in assessing whether employee wishes can be measured by the level of membership evidence filed by the applicant.

53. For all these reasons, we conclude that because of the respondent's violations of sections 64 and 66, neither a representation vote nor an assessment of the level of membership evidence before us are likely to reveal the true wishes of employees. In addition, the effect of the

respondent's misconduct is too far-reaching to be corrected or cured by the application of the Board's remedial powers under section 89.

54. Counsel for the respondent advised the Board that if the other criteria under section 8 were met, in light of the Board's jurisprudence he was prepared to concede that the applicant had membership support adequate for the purposes of collective bargaining. In these circumstances and in view of the membership evidence and other evidence before us, we find accordingly.

55. As a result, we conclude that all the elements required by section 8 are present in this case. A certificate will issue to the applicant. If the parties are unable to resolve their differences with respect to the two employees whose employment status is in dispute, they will be entitled to pursue the matter by way of an application under section 106(2) of the Act.

56. With respect to the section 89 complaint, the applicant is entitled to remedial relief for the respondent's violations of sections 64 and 66 independent of the certification application. Pursuant to section 89, we therefore direct the respondent:

- (a) to forthwith reinstate Harry Nokes to the position that he held prior to his discharge;
- (b) to pay to Harry Nokes and Philip Adams compensation for their losses resulting from the respondent's violations, together with interest to be calculated in accordance with Practice Note #13;
- (c) to post copies of the attached notice marked "Appendix" as supplied by the Board in conspicuous places on its premises and to keep such notices posted for sixty (60) working days and to take all reasonable steps to ensure that the notices are not altered or defaced or covered by any other material; and
- (d) to provide reasonable access to the applicant to permit it to satisfy itself that the respondent has complied with this order.

57. The Board remains seized to resolve any dispute with respect to implementing these orders.

Appendix
Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

AFTER A HEARING IN THIS MATTER IN WHICH BOTH REPLA LIMITED AND THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA HAD AN OPPORTUNITY TO PRESENT EVIDENCE, THE ONTARIO LABOUR RELATIONS BOARD HAS FOUND THAT THE COMPANY VIOLATED THE LABOUR RELATIONS ACT BY TERMINATING THE EMPLOYMENT OF HARRY HOKES AND PHILIP ADAMS. THE COMPANY HAS BEEN ORDERED TO REINSTATE MR. HOKES (MR. ADAMS DID NOT WISH TO BE REINSTATED) AND TO PAY COMPENSATION TO BOTH MR. HOKES AND MR. ADAMS. IN ADDITION, THE BOARD WISHES TO INFORM EMPLOYEES THAT THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

To organize themselves;

To form, join or help unions to bargain as a group,
through a representative of their own choosing;

To act together for collective bargaining;

To refuse to do any and all of these things.

THE COMPANY IS PROHIBITED BY THE ACT FROM:

Doing anything that interferes with these rights;

Intimidating or exerting undue influence upon you, whether through meetings, individual conversations or otherwise, to prevent you from exercising your right to associate and participate in the lawful activities of a union;

Laying off, discharging or threatening to lay off or discharge any employee because of that employee's union activity or sympathies;

In any other manner interfering with or restraining or coercing employees in the exercise of their rights under the Act.

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 12th day of DECEMBER . 19 90 .

1610-90-R Service Employees International Union, Local 204 affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C., Applicant v. Saint Luke's Place, Respondent

Certification - Natural Justice - Practice and Procedure - Representation Vote - Employer failing to post Form 70 with Officer's Report until terminal date - Board directing employer to post decision of Board notifying employees of right to make representations on vote or report - Certificate to issue if no representations received within fifteen days

BEFORE: *Janice Johnston*, Vice-Chair, and Board Members *G. O. Shamanski* and *J. Redshaw*.

DECISION OF THE BOARD; December 10, 1990

1. On the taking of the representation vote directed by the Board by decision dated October 18, 1990 more than fifty per cent of the ballots cast were cast in favour of the applicant.
2. It appears that the Form 70 with a copy of the Officer's Report attached was not posted by the employer as required. It was posted on November 19, 1990 which was the date fixed by the Board as the terminal date for the filing of a statement of desire to make representations pursuant to subsection 1 of section 70 of the Board's Rules of Procedure.
3. The Board directs the employer to post this decision of the Board in a timely fashion. If a party wishes to make representations as to any matter relating to the representation vote, or as to the accuracy of the report, or as to the conclusions the Board should reach in view of the report, you shall send to the Board a statement of desire to make representations which shall,

- (a) be in writing signed by the person making the statement or his representative;
- (b) contain the names of the parties to the application;
- (c) contain a return mailing address; and
- (d) contain a statement as to whether you desire a hearing before the Board in connection with the report.

If you desire to make representations as to any matter relating to the representation vote, or as to the accuracy of the report, your statement of desire must contain a concise statement of your allegations concerning the representation vote or as to errors in or omissions from the report. If you wish to make representations as to the conclusions the Board should reach in view of the report, your statement should contain a summary of the representations you wish the Board to consider in connection with the report.

4. If the Board does not receive a statement of desire within fifteen days of the date of this decision a certificate will issue to the applicant.
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1955-90-R Hospitality, Commercial and Service Employees Union, Local 73 of the Hotel Employees and Restaurant Employees International Union, Applicant v. Ronscott Inc. carrying on business as Shoreline Motor Hotel, Respondent

Certification - Practice and Procedure - Trade Union - Trade Union Status - No finding of status at the time application was filed, but its status was recognized by the Board in another unrelated proceeding, before the hearing date in this application - Union not obliged to prove status - Outstanding status issue no bar to meeting with Labour Relations Officer - Certificate issuing

BEFORE: Bram Herlich, Vice-Chair, and Board Members J. A. Ronson and K. Davies.

DECISION OF THE BOARD; December 7, 1990

1. This is an application for certification.
2. The parties met with a Labour Relations Officer on November 15, 1990 and, subject to the respondent's position that it was inappropriate for the officer to proceed with the meeting, were able to agree on a number of issues regarding the application.
3. This application was filed on October 24, 1990. As of that date the Board had not previously found the applicant to be a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* (although such a finding has previously been made in relation to the parent Hotel Employees and Restaurant Employees International Union). Consequently, as is the usual practice, the Registrar by letters dated October 30, 1990 advised the parties as follows:

On reviewing the application in the above matter, it appears from a check of the Board's status records that the Board has not found in any previous proceeding that the applicant has been found to be a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* under the name used in the current application.

If our information is correct, the applicant may be required at the hearing scheduled in this matter to satisfy the Board in accordance with its usual practice that the organization is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*, or is the same organization as one found previously to be a "trade union" by the Board.

If our information is incorrect, the applicant is to advise me immediately *in writing* of the file number of the Board proceeding in which the applicant under the present name has been found to be a trade union. If you have any questions, please contact James Bowman, Deputy Registrar, at 326-7500.

4. The respondents's reply is dated November 9, 1990 and was filed on November 13, 1990. The reply includes no reference to the issue raised in the Registrar's letter.

5. On November 14, 1990 the Board (differently constituted), after hearing the *viva voce* evidence called by the union and considering the conflicting submissions of the parties in that case, issued a decision wherein, inter alia, it found the applicant to be a trade union within the meaning of section 1(1)(p). That finding was made in the context of a certification application brought by the same applicant in respect of a different employer (*Quetico Centre*, unreported November 14, 1990, Board File 1748-90-R).

6. When the parties to the present application attended before the Labour Relations Officer on November 15, 1990 it would appear that neither they nor the officer was aware of the finding made by the Board the previous day. Both parties were aware of and had copies of that Board

decision when the instant matter came on for hearing before the present panel on November 22, 1990.

7. Section 105 of the *Labour Relations Act* reads as follows:

105. Where in any proceeding under this Act the Board has found or finds that an organization of employees is a trade union within the meaning of clause 1(1)(p), such finding is *prima facie* evidence in any subsequent proceeding under this Act that the organization of employees is a trade union for the purposes of this Act.

8. Thus, in the absence of any allegations and proof to the contrary, an earlier Board finding that an organization is a trade union within the meaning of the Act is sufficient to dispose of what is generally referred to as the "status" issue in all subsequent proceedings involving the same organization.

9. The applicant in the present case urges us to follow precisely that course. Mr. Bickford, on behalf of the respondent, however, takes the position that the Board's decision of November 14, 1990 should be treated as a nullity (at least as against his client) and asserts that the applicant ought to be required to again prove its status in a hearing where the respondent will have the opportunity to cross-examine any and all witnesses called by the applicant. He asserts that since the status issue was unresolved at the time the present application was filed, his client was entitled to both notice of and the right to participate in any hearing where that issue was litigated. He argues that since his client's rights were prejudiced by not receiving notice of that hearing that we should treat the decision which issued as inoperative.

10. The policy underlying section 105 [then section 94] was discussed in *Toronto Pattern Works Ltd.*, [1975] OLRB Rep. Dec. 911 at p. 911 as follows:

3.

The legislature has taken account of the fact that in the normal course a viable trade union continues as a viable trade union. A requirement for fresh oral testimony in each succeeding case after status has been proved would be inordinately time consuming and would place an onerous burden on trade unions to have witnesses present at all certification hearings in order to reprove status. Furthermore a requirement to reprove status might lead to labour relations instability if technical defects in one case were to bring into question the viability of the trade union in what might well be numerous other bargaining agency relationships establishe[d] subsequent to the initial proving of its status.

4. For sound industrial relations consideration therefore the certificate on the status of the applicant trade union is *prima facie* evidence of its status pursuant to section 94 of the Act. This is not to say, however, that the evidence of the applicant's status as embodied in the certificate can not be attacked and shown to be deficient to the extent that the Board, in the absence of countervailing evidence, will rule that the trade union no longer has status pursuant to section 1(1)(n) [now 1(1)(p)]. In the fac[e] of section 94 it follows however, that an onus attaches to the respondent to support by credible and meaningful evidence its allegations with respect to the status of the applicant. See the *Zeller's Limited* case [1970] OLRB Rep. Nov. at page 815 where the Board stated:

It should be clearly understood, however, that a mere allegation unsupported by probative evidence which will substantiate any such challenge will not be sufficient to rebut the *prima facie* evidence of the applicant's status as a trade union or the presumption with respect to the right of the applicant under its constitution to take into membership the employees of the respondent in the bargaining unit.

11. Mr. Bickford referred us to the well-known cases of *Re J. A. Weatherspoon and International Union U.A.W. Local 1256*, [1972] 2 O.R. 154 and *Re Bradley et al and Ottawa Profes-*

sional Firefighters Association et al, [1967] 2 O.R. 311 (C.A.) These cases involved issues of notice to employees potentially affected by the ruling of an arbitrator in grievances regarding competing seniority (viz. layoff or job promotion) rights. Mr. Bickford did not specifically articulate the nature of his client's interest it is said was prejudiced. Whatever the nature of that interest may be, it is not analogous to the interests examined by the Courts in the cases referred to.

12. Indeed, one may question whether Mr. Bickford's client's interest has been affected at all by the lack of notice of the *Quetico Centre* hearing. As the *Toronto Pattern Works Ltd.* case (*supra*) and others make clear, while a finding of status may well be res judicata in respect of the parties to a particular proceeding (see *The Sisters of St. Joseph of the Diocese of London, in Ontario*, [1972] OLRB Rep. Oct. 846) such a finding is not, strictly speaking, binding upon a stranger to the proceedings in which it is made. Thus, the Board has entertained challenges to previous findings of trade union status by parties not participating in the previous hearing where status was found (see for example *C.D.C. Holdings Limited*, [1979] OLRB Rep. Dec. 1142 and *Footwear Fashions Limited*, [1981] OLRB Rep. Apr. 454 - in the latter case, the Board found that despite an earlier finding to the contrary the intervener was not a trade union). It was certainly open to the respondent in this case to make allegations and call evidence to challenge the applicant's status - it did neither. All Mr. Bickford was seeking was that the applicant be required to call evidence to satisfy the Board anew of its status as a trade union. This is precisely the kind of mischief section 105 was designed to cure (see the *Toronto Pattern* case, (*supra*)).

13. While Mr. Bickford's submission must be considered primarily in relation to the interest claimed to be protected, we are not unmindful of the disruption and prolongation of certification proceedings as well as the prejudice to newly formed unions which would result were the Board to accept the submissions. In principle there is no material difference between the interest of the respondent in the present case and that of another employer asserting that a union whose status has been established and accepted for several years ought to be required to reprove its status because the employer did not participate in the hearing where status was found. (Of course it would be open to even that employer, as it was to the respondent in this case to call evidence to rebut the presumption of status.) While, in fairness to Mr. Bickford, he agreed that such a scenario might be advancing his argument too far, he would not concede that an employer made subject to a certification application filed shortly after a status finding had been made should not be permitted to require the applicant to reprove status. But even the principal thrust of Mr. Bickford's argument causes us great concern. He asserts that once an application is filed by a putative trade union, the Board has a positive obligation to advise and notify any persons involved in matters with that union so as to allow an opportunity to participate in the hearing where status will be determined. The practical effect of such a requirement could be an indefinite suspension of a union's right to the benefits of the Act. What, for example, would the Board be required to do when a subsequent application (involving a second respondent) is filed on the eve of the hearing (involving the first respondent) where status is to be determined? If that hearing had to be delayed for purposes of notice, could the cycle not repeat itself indefinitely?

14. Section 105 of the Act is designed specifically to avoid such difficulties. If the respondent wished to challenge the applicant's status it was free to make appropriate allegations and call supporting evidence. It chose to do neither.

15. In view of the finding of the Board in *Quetico Centre* (*supra*) and in view of the provisions of section 105 of the Act, we are satisfied and find that the applicant is a trade union within the meaning of section 1(1)(p) of the Act.

16. Mr. Bickford also asserted that it was inappropriate for the Labour Relations Officer to

have conducted the meeting between the parties in view of the "threshold" issue of status being still outstanding at the time the meeting was conducted.

17. It is axiomatic that expedition is a prime value in all proceedings before the Board, particularly certification applications. The Board's experience has demonstrated that many certification applications are not controversial and can be disposed of without the need for a formal hearing. In many cases applications are resolved through the "waiver" process wherein the parties are in telephone contact with a Labour Relations Officer. Many other certification applications are resolved subsequent to a more formal meeting between the parties and a Labour Relations Officer. Indeed, the Board, in order to expedite the process and to minimize unnecessary use of hearing time, has recently implemented a process whereby the parties meet with a Labour Relations Officer prior to (rather than on the day of) a scheduled hearing. The range of areas canvassed between the parties and the Labour Relations Officer is comprehensive and includes such issues as proper names of parties, bargaining unit descriptions, review of employee lists, disclosure of the "count", a review of membership evidence and supporting documentation and the establishment of a voters' list and vote arrangements in cases where a vote appears likely. Typically, the Labour Relations Officer prepares a report which the parties sign. The report catalogues the areas of agreement and disagreement between the parties on all matters relevant to the application. Where the parties are in complete agreement, a decision may issue without the need for a formal hearing. Where areas of dispute remain, a hearing will take place to deal with those areas only. This process has and continues to serve the parties and the community well.

18. The respondent's submissions in this case, if accepted, would undermine the process and disturb the efficiency the parties to Board certification hearings have come to expect. Disagreement on one issue should not preclude the officer from canvassing and recording the parties' agreement (or disagreement) on all other issues relevant to the application. If any time a disputed issue arose in a certification proceeding, a hearing and determination of that issue would have to conclude prior to the meeting with a Labour Relations Officer, the process would be unduly protracted.

19. Nor is there any magic in the fact that the issue in the present case was whether the applicant is a "trade union" within the meaning of section 1(1)(p) of the Act. Any agreement the parties enter in respect of other issues is obviously without prejudice to their right to argue the status (or any other disputed) issue before the Board.

20. In *Emery Industries Limited*, [1980] OLRB Rep. Mar. 316, the Board considered its jurisdiction to order and hold a pre-hearing representation vote prior to the union having proved status and concluded as follows:

11. We have carefully considered the submissions of the intervener with respect to the jurisdiction of the Board to order a representation vote. Essentially, the intervener argues that until a trade union establishes its status, it is not entitled to make use of the pre-hearing vote procedure. We cannot accept this contention. There is no reason for according the "status issue" a special significance which removes it from the ambit of a legislative scheme which specifically provides for a resolution of disputed issues *after* a vote is taken. Of course, if one adopts a strict "sentence-parsing" approach, one encounters the word "trade union" before mention is made of such matters as employee status, the appropriate bargaining unit, and membership in the trade union; but, while it may appear that one determination is a condition precedent separate from the next, in our view it is clear, having regard to the purpose and structure of section 8 [now section 9], that the Legislature intended that all of these matters be resolved at a hearing *following* the vote. The Board cannot certify the applicant union until its trade union status is determined; but we can see no reason for singling out the trade union status issue for special treatment; nor can we discern any labour relations objective which would be served by denying new unions access to the pre-hearing vote procedure. There is no reason why these new unions

should be put at a competitive disadvantage *vis-a-vis* established organizations, and it would require the clearest possible language before the Board would be driven to this conclusion. There may well be cases where the issues raised are of such nature, or complexity, that a pre-hearing vote is inappropriate. Section 8 is framed so that the Board has a *discretion* to order a pre-hearing representation vote, and Rule 5 of the Rules of Practice regulates the procedure which must be followed when the Board has refused this request. However, there is nothing in the issue of trade union status, *per se*, which prevents the taking of a vote, nor is there any evidence, in this case, of any other special circumstances which make such vote inappropriate or which justify any interference with the previous Board decision. In our view the Board was entitled to direct the taking of a vote and defer resolution of the trade union status issue.

21. We note, of course, that in pre-hearing applications the parties typically meet with a Labour Relations Officer in much the same fashion (with appropriate modifications to suit the procedure) as in a certification application where no pre-hearing representation vote is requested.

22. We adopt the reasoning of the Board in the above cited case and conclude that since an outstanding status issue is neither a bar to the holding of a Labour Relations Officer meeting nor the conduct of a vote prior to a hearing, there was then no impropriety in holding the Labour Relations Officer's meeting in the present case. On the contrary, in view of our description of the Board's process and the integral role of Officers' meetings within that process, it was entirely proper and desirable for the Officer in the present case to have completed all aspects of the meeting with the parties.

23. Having regard to the agreement of the parties the Board finds that:

all employees of the respondent in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor and the accountants/bookkeeper,

constitute a unit of employees of the respondent appropriate for collective bargaining.

24. Having regard to the further agreement of the parties and to all of the material before us, the Board is satisfied that more than fifty-five percent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 8, 1990, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

25. A certificate will issue to the applicant.

2105-89-U The Ontario Public Service Employees Union, Complainant v. Sudbury Youth Services Inc., Respondent

Discharge - Discharge for Union Activity - Interference in Trade Unions - Unfair Labour Practice - Employee discharged after minor misconduct - Employee had unsatisfactory performance record and knew his employment was in jeopardy - Employer knew employee had been involved in organizing campaign and might be on negotiating committee - While the appearance that a discharge is arbitrary or harsh may undermine an employer's assertion that union activity played no part in its decision, the appropriateness of discharge in the circumstances is not the issue before the Board - Evidence consistent with conclusion that termination was in no way caused by anti-union animus - Complaint dismissed

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *J. A. Ronson* and *K. Davies*.

APPEARANCES: *Kevin Whitaker*, *Peter Slee* and *Jean Sigouin* for the complainant; *Brian R. Gatien* and *B. Crockford* for the respondent.

DECISION OF THE BOARD; November 30, 1990

1. This is a section 89 complaint alleging that the respondent violated sections 64 and 66(a) of the *Labour Relations Act* (the "Act"). The complainant trade union withdrew its allegation of a violation of section 79 of the Act and also withdrew its request for consent to prosecute the respondent. After several days of hearings in Sudbury the parties convened in Toronto in order to make submissions. Having heard the parties' submissions, the panel adjourned to consider the matter, following which, we ruled that we were dismissing the complaint. We now provide our reasons.

2. The complaint concerns the termination from employment in November, 1989 of the grievor, Mr. Jean Sigouin. The respondent asserts that it terminated the grievor's employment for just cause, more specifically the grievor's overall poor performance. The complainant asserts that the grievor was terminated, at least in part, because he was responsible for bringing the union into the workplace and that the timing of the discharge was designed to keep the grievor off the union's negotiating committee. We heard considerable evidence in this case including thorough cross-examination of all of the witnesses. We do not intend to refer to all of that evidence but will summarize our findings.

3. There is no dispute between the parties concerning the application of the legal principles involved in this case. It is agreed that the onus is on the respondent to satisfy the Board on a balance of probabilities that the decision to terminate the grievor's employment was not motivated even in part by reason of the grievor having exercised his rights under the Act.

4. In determining any issues of fact we have assessed the credibility of the witnesses using factors including the consistency of their evidence, their demeanour, their ability to resist the influence of interest to modify their recollection, the firmness of their recollection, and what appears to us to be reasonably probable when the circumstances and the testimony of the witnesses are considered. Ms. Crockford was very straightforward in her evidence including throughout an extensive cross-examination. We found her to be a very credible witness and we accept her evidence. We found Mr. Pitz's evidence less credible in part, in that we are of the view that he exaggerated certain of his concerns. However, overall much of his evidence was consistent with Ms. Crockford's and with evidence called by the complainant. We found the grievor's evidence to be unresponsive, and in certain circumstances vague and/or selective.

5. The respondent operates a residential home for young offenders. The grievor was employed as an adolescent youth worker at the facility. The home has ten beds and most residents stay about a month. There are approximately ten full-time and twelve part-time staff employed. They are responsible for the supervision and care of the residents. Ms. B. Crockford is the Services' Director and Mr. R. Pitz is Assistant Director.

6. The grievor was hired in July 1986 on a part-time basis and transferred to full-time employment in the summer of 1987. He was hired without having the usual formal qualifications for the job. However as a condition of employment he agreed to complete a programme of course work available locally. The grievor's probationary period was extended in January 1988 to April 30, 1988. The respondent has established regular monthly supervision meetings with individual staff and supervisors in addition to evaluations and staff meetings and development sessions. The extent of these meetings with staff reflect the sensitive and demanding nature of the work being performed. The service is subject to scrutiny from various government agencies and family and the care and supervision of the residents can at times be difficult.

7. The complainant conceded that the grievor experienced serious performance problems in the past and that he was not a model employee in the fall of 1989 prior to his termination. We do not intend to review here all of the evidence we heard with respect to the grievor's performance over the course of his employment. However, there had been at least two matters, firstly, the failure to take a course and secondly the failure to report an allegation of abuse, that the grievor knew could have warranted his dismissal. In addition, among other things, he had been disciplined for the inappropriate use of locked isolation, for inappropriate staff coverage, and for failing to attend a staff training session.

8. In February 1989 the grievor failed to record an allegation of abuse of a resident by a staff member during his shift. There is no doubt that both Ms. Crockford and Mr. Pitz treated this as a serious breach of policy. We are satisfied that given the nature of the service and the nature of the allegation, their concern was well-founded. They were frustrated by the grievor's only display of concern, which was directed at whether he was to be paid for two and a half hours for being called in for the investigation of the incident. The complainant suggested that this frustration evidenced an antipathy towards the grievor in the context of employment issues and hence evidence of anti-union motive. We do not agree. Ms. Crockford and Mr. Pitz did not accept the grievor's priorities. They were of the view that had he properly reported the incident in the first place there may well have been no need for him to come in on his own time. At worst, it was a minimal consequence for what the respondent considered to be a serious error.

9. Also in the spring of 1989 the grievor and his partner were having difficulty working together, to the extent that it was interfering with the provision of service. After attempts to assist both, they were told by Ms. Crockford to work out their problems or start looking for other work. We are satisfied that in the spring of 1989 the grievor knew his continued employment was in serious jeopardy.

10. The grievor was then evaluated in July 1989. Mr. Pitz, the grievor's supervisor, attended that evaluation as did Ms. Crockford. It was a lengthy evaluation. The complainant asserts that the evaluation was designed to "set-up" and "browbeat" the grievor. Yet the evidence, including that of the grievor, does not establish that. Certainly a number of concerns were raised and discussed. The individuals participating in the evaluation brought different views of the grievor's performance to it. Ms. Crockford was concerned that the self-evaluation completed by the grievor was dramatically different from her own evaluation. She asked Mr. Pitz to attend the evaluation because he was the grievor's immediate supervisor and had more direct contact with him.

11. In reviewing the evaluation, although there are some areas where the grievor has improved or maintained an acceptable performance, there are also areas where serious concern remains. There is no doubt that during this evaluation the grievor was upset. He offered to resign. This offer was rejected by Ms. Crockford on the basis that she felt the grievor finally evidenced a willingness to change his behaviour and be more responsive to direction. During the evaluation, the grievor volunteered the information that he was involved in the union's organizing campaign. The grievor suggested as well that his role with the union influenced the evaluation. Ms. Crockford advised the grievor that the only relevant issue was his work performance. We note that the grievor left the evaluation having accepted it and indicating he would try to improve. No complaint was forthcoming until almost five months later and after his termination, notwithstanding his suggestion that his role in the union had been a factor in the evaluation. We are also satisfied that the grievor was aware that his continued employment remained in jeopardy.

12. The complainant, relying on evidence of Mr. Micelotta, argues that the respondent was aware of the grievor's role in the organizing campaign as early as June 1989. Even assuming that, there was nothing to stop the respondent from accepting the grievor's resignation on July 13, 1989 if they had wanted to act on that information. The grievor made no suggestion whatsoever that the resignation was anything but freely offered and rejected. The conduct of Ms. Crockford, Mr. Pitz and the grievor is more consistent with the conclusion that job performance was the respondent's only concern.

13. There is no evidence of any union activity prior to mid-May 1989. The union's first organizing meeting was June 15, 1989. The certification application was filed on June 27, 1989. Upon learning of the union's application, Ms. Crockford sought advise with respect to the rights of the respondent and of the employees. The certification application was processed without the need to attend a formal hearing and a certificate issued to the complainant. Although she frankly acknowledged she was initially hurt and angry that the employees were organizing a union, we accept her evidence that upon learning of the level of support for the certification application she resigned herself to the expression of choice by the employees. The Act does not require that an employer like the fact of a union organizing in their workplace or that they not feel angry about it. The Act prohibits action against the trade union or employees. We are satisfied that Ms. Crockford understood this distinction.

14. The allegation that the termination was designed to keep the grievor off the union's negotiating committee is not supported by the evidence. Ms. Crockford candidly admitted that she did not think that having the grievor on the union's negotiating committee would be good for the staff as she did not feel he would do a good job. This view was consistent with the views of at least some of the complainant's witnesses. The evidence does not support the conclusion that Ms. Crockford felt it would also be of benefit to the respondent not to have the grievor participate on the negotiating committee and that she then acted in concert with Mr. Pitz to terminate the grievor's employment. Although perhaps somewhat naive of some of the dynamics often found in labour-management relationships, Ms. Crockford's concern was genuinely expressed. We accept her evidence that she was prepared to deal with anyone the union put forward on its negotiating committee. The evidence of Mr. Fraser, an employee called by the complainant, about the conversation that he had over lunch with Ms. Crockford concerning the grievor's participation on the negotiating committee, supports this conclusion.

15. Mr. Pitz on the other hand, was of the view that having the grievor on the negotiating committee would be of benefit to the respondent. His reason was the same, that is, he felt the grievor would be ineffective. We do not take this as evidence of anti-union motive. It represents nothing more than the more usual recognition of opposing interests at the bargaining table.

16. From the complainant's point of view the employment relationship had survived what were the most serious breaches of conduct on the grievor's part. From the spring of 1989 to his termination, the respondent agreed that the grievor had not engaged in a repetition of serious misconduct. The complainant argues that this fact casts serious doubt on the respondent's argument that the decision to terminate was taken free of any anti-union motive.

17. Following the evaluation in July, the respondent was optimistic that the grievor was more willing to take responsibility for his conduct. That optimism however proved unwarranted. We heard extensive evidence of a number of incidents between July and November 1989 upon which the respondent ultimately relied in support of its decision to terminate. These included plans of care not being completed, medications not recorded, concern over how an incident between residents involving spitting was handled by the grievor, inappropriate use of sarcasm, inappropriate use of the word "do-do" in recording, and a failure to attend a required staff development session.

18. In each case the complainant attempted to show that these incidents were of a minor nature, had been exaggerated, or were an attempt to "set up" the grievor. In this regard the complainant challenges particularly the role and evidence of Mr. Pitz. Having reviewed all of that evidence we are of the view that some of Mr. Pitz's concerns may have been exaggerated. However we are also satisfied that any exaggeration arises from Mr. Pitz's distaste for the complainant's performance at this stage of his employment and not from any anti-union motive. At a time when the grievor knew or ought to have known that his employment relationship was in jeopardy (when one might anticipate that an employee would perform at his best) the grievor chose to engage in further irresponsible, although minor, misconduct.

19. For example, the complainant failed to attend a staff development session on November 9, 1989 shortly before his termination. The notice for the meeting made it clear that the service felt it important that all staff attend and requested that if anyone was unable to attend, to notify Ms. Crockford or Mr. Pitz as soon as possible. The grievor did not attend nor did he contact anyone. He was the only staff person not in attendance. When confronted and in his evidence, the grievor's reaction was essentially "what's the big deal?". Yet in November 1987 the grievor had been disciplined for a similar failure to report for staff training and was warned that a recurrence would result in more serious discipline. This occurred in the context of an employee who does not have the formal education requirements for the job and could arguably benefit more from such sessions.

20. Similarly, the grievor's recording of the expression "all do-do" intending to mean "all asleep", in the respondent's log is conduct, in and of itself, which would not warrant termination. Yet it was unprofessional. The log forms part of the service's official records and may be referred to externally.

21. The complainant led evidence showing that the use of a raised voice and of sarcasm can be tools in handling residents' behaviour. We accept this. However it was also clear from all the witnesses that these tools could be used inappropriately. In one incident relied on, Ms. Crockford and Mr. Pitz felt the grievor's use of sarcasm to be inappropriate. They felt it conveyed frustration and/or anger and an inappropriate reference to violence.

22. Notwithstanding that the grievor could have enrolled in a course in the fall of 1989 he failed to do so. In his evidence he acknowledged that he had not as of the hearing, enrolled in such a course due to the fact that he had been discharged and was not sure whether he wanted to continue in this type of work. This evidence of what at best might be described as a lack of enthusiasm and at worst, a non-caring, ambivalent attitude, was consistent with the grievor's response with respect to other concerns raised about his performance.

23. Mr. Pitz reported these incidents to Ms. Crockford. In the context of the grievor's record, these incidents took on a greater significance. The will to improve evidenced in July had not manifested itself. Ms. Crockford reviewed the matter with Mr. Pitz and they decided to recommend that the grievor's employment be terminated. This recommendation was placed before the Board of Directors of the Service and was accepted.

24. The complainant argued that the grievor had been singled out for discipline. Mr. Fraser was not disciplined for sleeping on the job. He was surprised. He expected to be disciplined for the incident. It was clear however that neither Ms. Crockford or Mr. Pitz were aware of the incident although Mr. Micelotta apparently was. However, Mr. Fraser was disciplined in April 1989 for a more minor incident whereby he breached a security procedure by not ensuring that he or his partner were available at a work station. Mr. Pitz referred to anecdotal notes about the grievor that he kept on "sticky yellow" papers. Yet he keeps such notes on other employees as well. Mr. Fraser and Ms. Harvey confirmed that other employees also used sarcasm and a raised voice in dealing with residents, but whether a response was appropriate or not would depend on the circumstances, the words used, the tone, etc. Overall, this evidence is more consistent with the conclusion that the respondent monitors all its employees and is prepared to take action as necessary, whether through discipline, discussion at monthly supervision meetings, or through evaluations.

25. The complainant also argued that because the incidents following the July evaluation were of a minor nature, and because of the timing of the evaluation and the termination in relation to the union's organizing campaign and preparation for negotiations, the employer cannot overcome the onus on it to show that its decision was free of anti-union motive. We agree with the complainant that the timing of events is an important factor to consider. Where a union organizer is discharged during or soon following an organizing campaign it is natural to question whether the employee's involvement in the union played a role in the decision to terminate. To that extent, where there is a connection in time between the events there may always be a doubt. However, the respondent is not required to satisfy the Board beyond any reasonable doubt but on a balance of probabilities and that doubt may well be satisfied by other evidence.

26. Further we agree that where a discharge appears to be arbitrary or harsh it may undermine the employer's assertion that the employee's union activities played no part in the decision to discharge. However we disagree with the conclusions advanced by the complainant on the evidence in this case. Throughout his evidence the grievor showed little if any appreciation of the respondent's concerns. We are satisfied that, taken as a whole, they were largely legitimate concerns sincerely held. The grievor had been provided with considerable direction and opportunity to improve. Whether discharge was appropriate in the circumstances is not the issue. However, the evidence is more consistent with the conclusion that the termination was not motivated by reason of any union activity than the assertion that in the circumstances the termination was an arbitrary or overly harsh response.

27. Having regard to all of the evidence and submissions of the parties we were satisfied that the decision to terminate the grievor's employment was in no way motivated by his participation in the union's organizing campaign or in anticipation of his participation on the union's negotiating committee. Therefore we dismissed the complaint.

1547-90-U Christopher Topple, Complainant v. The International Union, United Plant Guard Workers of America Local 1962, Respondent v. General Motors of Canada, Intervener

Practice and Procedure - Witness - Board reviewing requirements of valid summons - Summons must be served personally with appropriate conduct money - Conduct money must be cash - Summons unenforceable where conduct money was in the form of a money order

BEFORE: G. T. Surdykowski, Vice-Chair.

APPEARANCES: Christopher Topple on his own behalf; Donald K. Eady and Watson E. Cook for the respondent; J. Hanson and Ms. E. Campin for the intervener.

DECISION OF THE BOARD; December 3, 1990

1. At the conclusion of the hearing on November 27, 1990 herein, an issue arose with respect to the enforceability of two summonses which the complainant asserts he served, one on a Eugene McConville and one on a Frederick R. Curd, Jr.

2. In his affidavit of service with respect to the McConville summons, the complainant swears or affirms (it is not specified which) that on October 8, 1990 he served Mr. McConville with a summons at 25510 Kelly Road, Roseville, Michigan, together with conduct money in the form of a money order in the amount of \$325.00 in U.S. funds. The respondent challenges this summons. With respect to the Curd summons, the complainant swears or affirms (again it is not specified which) that he served Mr. Curd with a summons on October 12, 1990 at 3741 Lakeshore Road in Newcastle, together with conduct money in the form of a money order in the amount of \$90.00. The intervener challenges this summons.

3. The complainant asserts that he served both summonses in accordance with the instruction sheet he received from the Board with the summons he requested. When the Board's office sends summons to a party which has requested them, a sheet in the following form is sent with them:

Summons to Witness

Statutory Powers Procedure Act, R.S.O. 1980, c.484, s.12(2)(c):

12.-(2) A summons issued under subsection (1) shall be in Form 1 and,

• • •

- (c) shall be served personally on the persons summoned who shall be paid the like fees and allowances for his attendance as a witness before the tribunal as are paid for the attendance of a witness summoned to attend before the Supreme Court.

Rules of Civil Procedure, Tariff A, Item 19:

Attendance money actually paid to a witness who is entitled to attendance money, to be calculated as follows:

1. Attendance allowance for each day of necessary attendance \$50.00
2. Travel allowance, where the hearing or examination is held,

- (a) in a city or town in which the witness resides, \$3.00 for each day of necessary attendance;
- (b) within 300 kilometres of where the witness resides, \$0.24 a kilometre each way between his or her residence and the place of hearing or examination;
- (c) more than 300 kilometres from where the witness resides, the minimum return air fare plus \$0.24 a kilometre each way from his or her residence to the airport and from the airport to the place of hearing or examination.

3. Overnight accommodation and meal allowance, where the witness resides elsewhere than the place of hearing or examination and required to remain overnight, for each overnight stay \$75.00

PLEASE READ THE ABOVE CAREFULLY. THE BOARD CANNOT PROVIDE YOU WITH ADVICE AS TO HOW TO COMPLETE THE SUMMONS NOR HOW IT MUST BE SERVED.

4. For a summons to be enforceable, it must be served personally upon the individual being summonsed together with the appropriate conduct money. Unless otherwise provided for through the appropriate reciprocal legislation, the summons must be served within the geographic jurisdiction of the tribunal whose process it is a part of in order to be enforceable. As the Board pointed out in *Hamilton Automatic Vending Company Limited*, [1989] OLRB Rep. March 248:

19. Under the *Labour Relations Act*, the Board has the power to summon and enforce the attendance of witnesses and compel them to give evidence under oath and to produce such documents and things as the Board may require. The Board also has the power to determine its own practice and procedure. The Board's power to summons witnesses and compel their testimony is repeated in section 12 of the *Statutory Powers Procedure Act* which, in subsection 2, subparagraph (c), adds the requirement that a summons issued by the Board

shall be served personally on the person summoned who shall be paid the like fees and allowances for his attendance as a witness before the tribunal as are paid for the attendance of a witness summoned to attend before the Supreme Court.

Where a summons is issued by this Board at the request of one of the parties to proceedings before it, that party is expected to effect service and pay conduct money in accordance with this requirement. It is on that basis that parties are provided with summonses at their request. Although neither the *Labour Relations Act* nor the *Statutory Powers Procedure Act* ("the SPPA") expressly confers on the Board the power to enforce payment of conduct money, it seems to us that this must be a concomitant of the express power to summons and compel attendance of witnesses, particularly in circumstances where natural justice requires that that power be exercised on behalf of and at the request of parties to proceedings. It is part of the Board's process that conduct money be paid by the parties who request and effect service of a summons. It is arguably an abuse of the Board's process to make use of a summons without discharging the corresponding obligation with respect to conduct money.

20. Subsection 23(1) of the SPPA provides:

A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

If the power to enforce payment of conduct money by a person who uses a Board's summons is not implicit in the Board's powers to determine its own practice and procedure and to summons and compel the attendance of witnesses, then it seems to us that such a power must flow from subsection 23(1) of the *Statutory Powers Procedure Act*. We are in no doubt of the potential for abuse of the Board's processes by the use of its summonses. A finding that such abuse has occurred is not a prerequisite to the exercise of our power under subsection 23(1) of the SPPA...

5. Although it is less than obvious on the face of Tariff A of the Supreme Court of

Ontario's Rules of Simple Procedure, it is well settled that the conduct money which accompanies a summons must be both sufficient in its amount and, as the affidavit service suggests, in "cash". For the purposes of conduct money, "cash" means "ready money" in the sense of the actual currency used as a medium of exchange in the jurisdiction. It does not include cheques, whether certified or not, or money orders (see *Acadian Bricklayers Ltd.*, [1984] OLRB March 399).

6. Accordingly, neither the McConville nor the Curd summons as aforesaid is enforceable. The McConville summons was not served on Mr. McConville while he was in the Board's jurisdiction and the money order which accompanied it does not constitute appropriate conduct money. The Curd summons was not accompanied by conduct money in a proper form either (in my view Mr. Curd was entitled to a \$50.00 per day attendance allowance, travel allowance of \$0.24 per kilometre each way between his residence and the Board; there is insufficient information before the Board for me to comment on whether he would be entitled to an accommodation and meal allowance).

2353-89-U Toronto Transit Commission, Complainant v. Amalgamated Transit Union, Local 113, Respondent, v. William L. Franco et al., Interveners

Intimidation and Coercion - Strike - Unfair Labour Practice - Collective agreement permitting inspectors to maintain union membership and departmental seniority rights on return to bargaining unit, provided they maintained union membership - Inspectors threatened with expulsion by union if they performed bargaining unit work during strike - Expulsions carried out - Employer arguing union counselled illegal strike and penalized inspectors for failure to participate in illegal strike - Refusal by inspectors to work would not have been "strike" within meaning of Act - Illegal strike provisions of Act inapplicable - No intimidation or coercion - Act giving only limited rights to managerial personnel - Statutory provision making agreement binding on employer and union not creating rights under Act for managerial personnel - Complaint dismissed

BEFORE: S. A. Tacon, Vice-Chair, and Board Members W. H. Wightman and H. Peacock.

APPEARANCES: Bruce Stewart, Neal Sommer and Bruno Iannacito for the complainant; L. C. Arnold, R. Hutcheson and L. Moore for the respondent; Harry Freedman, Barry Bernardo and William Franco for the interveners.

DECISION OF THE BOARD; December 20, 1990

1. The name of the respondent is amended to read: "Amalgamated Transit Union, Local 113."
2. This is a complaint pursuant to section 89 of the *Labour Relations Act* alleging violation of sections 70, 71a, 74, 76 and 78. (The allegation that section 71a was breached was not pursued.) The complainant is the Toronto Transit Commission (the "TTC" or the "employer"); the respondent is Local 113 of the Amalgamated Transit Union (the "union"). In an oral ruling, the Board directed that the inspectors represented by Mr. Freedman be added as interveners in these proceedings. The complaint arises out of the expulsion from Local 113 in October 1989 of inspectors who are employees of the TTC but excluded from the bargaining unit represented by the union.

3. A number of preliminary objections were raised. Several were dealt with by the Board at the hearing and should be noted briefly.

4. Counsel for the TTC clarified that the gravamen of the complaint was confined to two areas, namely: the moving of the resolution (set out in the schedule to the complaint), and the carrying forward of that resolution once passed by means of the notice of October 16, 1989 over the signature of R. L. Hutcheson and L. Moore. Whether the allegation impugned by union counsel was characterized as sufficiently clear in the March 7 letter from company counsel or as an amendment requested at the hearing, the Board ruled it was satisfied that the allegation should not be struck out at that stage of the proceedings.

5. With respect to another preliminary motion of union counsel, the Board ruled as follows:

In the Board's view, the question at issue is simply "can the intervener agree to facts and premises for purposes of these proceedings?" When framed in that manner, the question is not novel. Parties often reach factual agreements restricted to a particular case in order to facilitate the determination of legal questions and the Board proceeds on that basis. The "precedential" value of a Board decision reflects the factual context in which the case proceeded. In the instant case, the interveners take the position that, for purposes of these proceedings, the interveners agree to all matters agreed to by the company and the union. The Board regards that as an appropriate basis on which this case should proceed. That said, there is nothing to preclude counsel in other proceedings (such as the section 68 complaint) from raising whatever arguments he wishes for determination by that panel.

6. The parties were able to agree, before the Board, on all relevant facts; documentary material was also filed with the Board on consent. That factual agreement was reduced to writing by the parties and filed with the Board at the continuation of the proceedings for purposes of hearing counsels' submissions with respect to the remaining preliminary motions and the merits of the complaint. It is not necessary, however, to set out that agreement, including the various paragraphs from the pleadings which were incorporated in that agreement. It is useful to briefly summarize the chronology of events, based on the parties' agreed facts, which are relevant for the purposes of this complaint.

7. Prior to 1986, the constitution of the union provided that inspectors may retain union membership by paying dues and by remaining members in good standing. Further, the Local by-laws stated that those persons shall have their seniority rights protected upon their return to the bargaining unit provided, while outside the unit, they remained in good standing and paid dues. While outside the unit, the inspectors had no voice or vote in the Local affairs except in the election of officers and delegates to conventions. In 1986, the constitution was amended to place the retention of the active Local membership status of persons outside of the bargaining unit at the discretion of the Local. If the Local declined to permit such persons to retain their Local union membership, those individuals could, by taking a withdrawal card from the Local and filing such with the International, continue their membership in the International as a member-at-large. [The Board has throughout referred only to inspectors, given the instant complaint, although the constitution, by-laws and seniority regulations include persons in other categories, analogous to inspectors].

8. The seniority regulations negotiated between the TTC and the Local (and for the Board's purposes in these proceedings considered incorporated into the collective agreement) provided that employees who transferred to non-union staff positions (including inspectors) and subsequently returned to the bargaining unit shall retain their seniority if their membership in good standing in the Local has been maintained while in their staff positions.

9. On August 27, 1989, the Local voted to initiate job action in the form of a work to rule and, then, effective September 3, through a four-day work week. Union members who refused to comply with the job action would be subject to such penalties as the membership might impose. By letter dated September 1, 1989, the TTC informed the Local that bargaining unit work would be performed by staff employees, including inspectors. At a general meeting of the Local on September 12, the following Notices of Motion were introduced and advertised as provided for in the by-laws.

NOTICES OF MOTION

#1 " WHEREAS MEMBERS OF LOCAL 113 HAVE BEEN APPOINTED TO THE MANAGEMENT AND SUPERVISORY POSITIONS WHICH ARE OUTSIDE THE BARGAINING UNIT AND HAVE BEEN PERMITTED TO RETAIN MEMBERSHIP IN LOCAL 113 AS AUTHORIZED BY THE UNION CONSTITUTION;

AND WHEREAS ACTING INSPECTORS HAVE REMAINED MEMBERS OF LOCAL 113 AS PROVIDED FOR IN THE COLLECTIVE AGREEMENT; AND WHEREAS DURING THE CONTINUING STRIKE ACTION THE TTC HAS REQUESTED BOTH SUPERVISORY PERSONNEL AND ACTING INSPECTORS TO PERFORM BARGAINING UNIT WORK;

AND WHEREAS LOCAL 113 HAS STATED THAT IF SUCH PERSONS PERFORM BARGAINING UNIT WORK WHILE STRIKE ACTION CONTINUES, THEIR MEMBERSHIP IN LOCAL 113, AND IN CONSEQUENCE THEIR RIGHT TO RETURN TO THE BARGAINING UNIT WITH FULL SENIORITY, SHALL BE REVOKED;

NOW THEREFORE BE IT RESOLVED AS FOLLOWS:

1. ANY INSPECTOR OR ACTING INSPECTOR OR SUPERVISORY PERSONNEL WHO IS A MEMBER OF LOCAL 113 AND WHO REFUSES THE TTC REQUEST TO PERFORM BARGAINING UNIT WORK DURING THE PERIOD OF THE CURRENT STRIKE ACTION SHALL BE ACCEPTED BACK INTO THE BARGAINING UNIT WITH FULL ACCRUED SENIORITY.

2. ANY INSPECTOR OR ACTING INSPECTOR OR SUPERVISORY PERSONNEL WHO DOES NOT RETURN TO THE BARGAINING UNIT AS PROVIDED FOR IN PARAGRAPH #1 SHALL HAVE HIS MEMBERSHIP IN LOCAL 113 FORTHWITH TERMINATED.

3. ANY INSPECTOR OR ACTING INSPECTOR OR SUPERVISORY PERSONNEL WHOSE MEMBERSHIP IN LOCAL 113 IS TERMINATED IN ACCORDANCE HEREWITH SHALL BE ENTITLED TO TAKE OUT A WITHDRAWAL CARD AND REMAIN A MEMBER-AT-LARGE OF THE INTERNATIONAL UNION AS PROVIDED FOR IN THE CONSTITUTION."

THE ABOVE NOTICE OF MOTION WAS MOVED BY THE EXECUTIVE BOARD OF LOCAL 113

#2 " WE MOVE OR CAUSE TO BE MOVED THE FOLLOWING MOTION ON NOTICE OF MOTION, THAT ALL MEMBERS WHO KNOWINGLY REFUSED TO COMPLY WITH THE JOB ACTION PASSED BY THE MEMBERSHIP IN ATTENDANCE AT THE MASS MEETING, AUGUST 27TH, 1989 WILL BE DEALT WITH IN ACCORDANCE WITH SECTION 22 OF THE CONSTITUTION AND GENERAL LAWS."

THE ABOVE NOTICE WAS MOVED BY THE EXECUTIVE BOARD OF LOCAL 113.

The membership approved the motion in a secret ballot vote at a meeting on October 15, 1989. Immediately thereafter, a bulletin was published as follows (although the Board has not reproduced the Notice of Motion as set out above but which was attached to the bulletin):

BULLETIN

ALL LOCAL 113 MEMBERS WHO HAVE JOBS OUTSIDE THE BARGAINING UNIT HAVE BEEN SENT THE FOLLOWING LETTER:

After, a bulletin was published as follows (although the Board has not reproduced the Notice of Motion as set out above but which was attached to the bulletin):

TO ALL INSPECTORS, ACTING INSPECTORS, FOREMEN AND OTHER SUPERVISORY PERSONNEL:

DURING THE RECENT CONTRACT DISPUTE, CERTAIN INSPECTORS, ACTING INSPECTORS, FOREMEN AND OTHER SUPERVISORY PERSONNEL, WHO ARE MEMBERS OF LOCAL 113, PERFORMED THE WORK OF BARGAINING UNIT PERSONNEL WHO WERE NOT WORKING AS A RESULT OF JOB ACTION CALLED BY LOCAL 113.

IN CONSEQUENCE, SUBJECT TO THE PART OF THIS NOTICE RELATING TO ACTING INSPECTORS SET OUT BELOW, THE MEMBERSHIP OF LOCAL 113 HAS DETERMINED BY RESOLUTION THAT IT IS INAPPROPRIATE FOR ANY SUCH SUPERVISORY PERSONNEL TO REMAIN MEMBERS OF LOCAL 113.

BY RESOLUTION OF LOCAL 113 MEMBERSHIP WHICH WAS PASSED BY BALLOT VOTE AT A REGULARLY CALLED MEMBERSHIP MEETING ON OCTOBER 15, 1989, IT WAS RESOLVED THAT ALL SUCH SUPERVISORY PERSONNEL ARE NO LONGER TO BE MEMBERS OF LOCAL 113. HOWEVER, IN ACCORDANCE WITH THE AMALGAMATED TRANSIT UNION CONSTITUTION, THESE PERSONS MAY BECOME MEMBERS-AT-LARGE OF THE INTERNATIONAL UNION.

A COPY OF THE RESOLUTION IS ENCLOSED.

ACTING INSPECTORS

THE APPLICATION OF THE RESOLUTION TO THE CLASSIFICATION OF "ACTING INSPECTOR" HAS BEEN DEFERRED PENDING RESOLUTION OF THEIR STATUS, WHICH WILL DETERMINE WHETHER OR NOT THE "ACTING INSPECTOR" SHOULD REMAIN IN THE BARGAINING UNIT.

CONSEQUENTLY, UNTIL THE STATUS OF "ACTING INSPECTOR" IS DETERMINED BY THE ONTARIO LABOUR RELATIONS BOARD OR BY AGREEMENT OF THE UNION AND THE TTC, PERSONS WHO ARE WORKING AS ACTING INSPECTORS MUST CONTINUE TO BE MEMBERS OF THE UNION IN GOOD STANDING.

[The Board is not concerned, in these proceedings, with the acting inspectors].

10. As a result of the motion depriving inspectors of their local membership, inspectors could no longer return to the bargaining unit with their "departmental seniority" (affecting preferential selection of available scheduled work) although their system seniority (affecting vacation for example) remained intact provided the inspectors continued as members-at-large in the International. Grievance proceedings against the local were commenced by the TTC but have been adjourned *sine die*.

11. The Board next sets out the representations of counsel in highly abbreviated form. It should be noted that, given that the parties were able to reach agreement on facts, submissions of counsel included argument on the merits as well as those preliminary motions of union counsel not dealt with earlier.

12. Counsel for the TTC reviewed the sequence of events. It was argued that the notice of the motion to revoke the membership in the Local of inspectors who complied with company

orders to perform bargaining unit work constituted a threat contrary to sections 74 and 76 of the Act. Further, the actual implementation of this "threat" at the October 15, 1989 union meeting after the strike itself had ceased, violated the Act as well. Counsel acknowledged that the union had acted in compliance with its constitution in approving the impugned motion but asserted that "constitutionality" could not insulate the conduct from Board review if that conduct was contrary to the Act. It was stressed that the company was not seeking the restoration of membership in the Local for the inspectors but merely to restore their right to return to the bargaining unit with their full departmental seniority. That is, counsel was challenging the retroactive stripping of the inspectors' seniority by the unilateral action of the union. The unusual nature of the protection of the seniority of inspectors upon their return to the bargaining unit, i.e. that right was not time-limited, was also emphasized. Counsel noted that the inspectors, in performing bargaining unit work, had a legal obligation to carry out the company's directives. Counsel contended that the union threatened the inspectors (with the revocation of the inspectors' membership) if they (the inspectors) did not engage in an unlawful strike. It was argued that the reference to "strike" in sections 74 and 76 was broader than the definition of "strike" in the Act itself and could include a "strike" at common law. In this regard, counsel noted that the reference to "strike" in sections 74 and 76 was broader than that reference in section 78 which was qualified by the phrase "under this Act". Nonetheless, counsel argued, on grounds of public policy, for a broad construction of the term "strike" to prevent unlawful actions in the course of exercising statutory strike rights. Cases referred to included: *Toronto Transit Commission* (unreported, November 8, 1989) (Keller); *C.P.R. Co. v. Zambri* (1962), 34 D.L.R. (2d) 654 (S.C.C.); *Sarnia Construction Association*, (1982) 82 CLLC ¶16,182 (OLRB); *Bents Brewery Co., Ltd. and others v. Luke Hogan*, [1945] 2 All E.R. 570; *A.A.S. Telecommunications Ltd. and Zipcall Ltd.*, [1976] OLRB Rep. Dec. 751.

13. Counsel for the interveners adopted the submissions of employer counsel but stressed that the argument proceeded on the agreement, in the context of this complaint that the inspectors were not employees for purposes of the Act. It was argued that the work performed by the inspectors in 1989 had been performed without incident in the past and, as the inspectors continued to pay union dues, they should not be retroactively deprived of their seniority rights for resisting the union's threat. Counsel noted that the union's by-laws had recognized the potential conflict between the inspectors and other members by restricting the inspectors' right to vote, etc. and the union should not be able to destroy the *status quo* with respect to seniority merely because that potential conflict materialized. Counsel emphasized that the seniority rights of inspectors were conferred in the collective agreement through the incorporation therein of the Seniority Regulations and, therefore, contended that the stripping of those rights could not be construed merely as an internal union matter. Counsel argued, that by virtue of section 50, the seniority rights under the collective agreement became rights under the Act. Thus, it was submitted, a person exercising a right under a collective agreement was, in fact, exercising rights under the Act and a threat (as here) to take away those rights constituted a breach of section 70. It was stressed that the inspectors were not seeking to enforce the collective agreement itself but were relying on those collective agreement rights (of seniority), through section 50, to ground an asserted violation of section 70. Counsel emphasized the importance of seniority rights and distinguished those cases cited by union counsel on the ground that the inspectors were not seeking reinstatement to local membership, just restoration of the *status quo* in regard to seniority rights. It was contended that the Act applied to section 1(3)(b) persons, albeit with limitations, in view of their position as "managerial." On this basis, the inclusive form of the definition of "strike" could encompass a cessation of work by non-employees, counsel submitted. Counsel noted that the jurisprudence rejected the proposition that trade unions need be organizations wherein membership was restricted to "employees" only and argued that the Board could and should have regard to the "raw deal" inflicted by the union on the inspectors wherein the inspectors were deprived of their seniority rights for following the company's orders and performing their duties as they had in the past. Cases referred to or commented on

included: *Dufferin Aggregates*, [1982] OLRB Rep. Jan. 35; *Re. Miller et al. and Algoma Steelworkers Credit Union Ltd. et al.*, [1974] 6 O.R. (2d) 676 (Ont. Div. Ct.); *J. G. Rivard Limited*, [1980] OLRB Rep. July 1009; *Barbara Jarvis v. Associated Medical Services Ltd. et al.* (1964), 64 CLLC ¶15,511 (S.C.C.); *Ottawa General Hospital*, [1974] OLRB Rep. Oct. 714; *A.A.S. Telecommunications, supra*.

14. Counsel for the union asserted the complaint should be dismissed on several grounds. It was argued that the facts as agreed did not make out a *prima facie* breach of the Act. The inspectors' seniority rights were merely inchoate rights dependent upon continued membership in the Local which could be revoked following the 1986 constitutional amendment or lost through negotiation or the failure to pay union dues. It was stressed that the union acted in accordance with its by-laws in revoking the inspectors' membership in the Local, that such a response was reasonable in the circumstances wherein managerial persons were performing bargaining unit work, that persons within the bargaining unit would be at similar risk of loss of membership if they refused to engage in a lawful strike and that the inspectors retained their membership in the International Union and could return to the bargaining unit with their system wide seniority, albeit not their departmental seniority (which affected bidding rights on runs, for example). The Board should not, and does not, interfere in the internal affairs of unions, it was submitted, particularly since, it was not disputed, the union had acted in accordance with its by-laws. Counsel contended that the Board had no jurisdiction to find a contravention of sections 74 and 76 brought by an employer and that the interveners could not seek their own remedy in section 70 through reliance on section 50. It was submitted that the only practical means of restoring the inspectors' inchoate seniority rights was to directly or indirectly reinstate them as members of the Local, a direction which the Board lacked the jurisdiction to order or, at least, should not exercise its discretion to order in the circumstances, particularly on behalf of "managerial" persons. It was argued that Bill 58 (which ended the strike) which precluded changes to the collective agreement except those agreed to by the parties deprived the Board of authority to order the relief requested. Counsel acknowledged that a collective agreement could provide benefits to persons outside the bargaining unit but submitted that those rights were not enforceable through sections 50 and 70 at the instance of such persons (the inspectors, in the instant case). Counsel asserted that sections 74 and 76 did not create "substantive" rights but were merely prohibitions and, further, that section 70 (and 74 and 76) were not provisions under which managerial persons could claim protection. The Board should not use section 89 except to enforce, for managerial persons, substantive rights under the Act. In the alternative, counsel argued that, even if the union sought to induce an unlawful strike of managerial persons, the Board should not direct relief at the instance of those managerial persons to have their privileges restored or at the instance of the company which, it was asserted, had precipitated the problem. It was suggested the inspectors could look to the courts for relief alleging a threat to induce breach of contract but the Board should exercise its discretion to refuse to entertain the complaints. Or, the Board should exercise its discretion to defer to arbitration, which proceedings had been initiated by the company and adjourned *sine die*. Finally, in the further alternative, should the Board find a breach, the only appropriate remedy was a declaration, not a direction to amend the collective agreement and/or restore the inspectors' membership in the Local. Cases referred to: *J. Paiva Foods*, [1985] OLRB Rep. May 690; *Toronto Transit Commission*, [1967] OLRB Rep. Feb. 878; *Transit Windsor*, [1979] OLRB Rep. Mar. 262; *Ottawa General Hospital, supra*; *A.A.S. Telecommunications, supra*; *The Board of Education for the City of York*, [1985] OLRB Rep. June 997; *Frank Manoni*, [1981] OLRB Rep. Dec. 1775; *Luciano D'Alessandro*, [1987] OLRB Rep. July 986; *Barbara Jarvis, supra*.

15. Counsel for the interveners distinguished those cases cited by the union on the basis that the inspectors were not seeking reinstatement to union membership or to employment but merely restoration of their seniority rights. It was argued that there was no evidence before the

Board of "hard feelings" or "animosity" between the bargaining unit members and the inspectors because of the inspectors' carrying out of the company's directives. That the parties could negotiate away the inspectors' seniority rights was distinguished from the unilateral act by one party, as here. Counsel argued that Bill 58 did not preclude a Board order directing the union, for example, to agree to a provision protecting the inspectors' seniority rights. Counsel also submitted that the interveners were entitled to seek relief, albeit for their benefit, which arose from the company's pleadings. That is, the inspectors had rights under the Act by virtue of section 50 and the provisions of the collective agreement and section 70 protected the inspectors in the exercise of those rights.

16. In reply, counsel for the TTC sought to distinguish those cases referred to by union counsel and asserted that the Board was not bound by the decision in *Jarvis, supra*, with respect to the interpretation of the reference to "persons" in sections 74 and 76. It was conceded that there was no evidence of a breach of contract by the inspectors and no written contract of employment but counsel contended that the union's conduct was intended to cause a mass quitting or a mass resignation and, therefore, contravened sections 74, 76 and 78.

DECISION

17. Given the allegations and the scope of counsels' submissions, it is useful to first set out the relevant sections of the Act.

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

74. No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.

76.-(1) No person shall do any act if he knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

(2) Subsection (1) does not apply to any act done in connection with a lawful strike or lawful lock-out.

78. No trade union shall suspend, expel or penalize in any way a member because he has refused to engage in or to continue to engage in a strike that is unlawful under this Act.

1.(1) (o) "strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output;

1. (3) Subject to section 90 for the purposes of this Act, no person shall be deemed to be an employee,

• • •

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

50. A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.

90. For the purposes of section 80 and any complaint made under section 89, "person" includes any person otherwise excluded by subsection 1(3).

18. The Board first deals with the alleged violations of section 74, 76 and 78 of the Act. The thrust of the complainant counsel's argument was that if the inspectors had refused to perform bargaining unit work as directed by the TTC, that refusal would have constituted an unlawful strike. By requiring the inspectors to refuse to perform bargaining unit work as directed by the TTC or else lose their membership in the Local (and thus their departmental seniority rights should they wish to return to the bargaining unit), it was argued the union at least counselled, procured, suggested or encouraged an unlawful strike (in contravention of section 74, and, in contravention of section 76, acted in the knowledge that a probable and reasonable consequence of their action was that other persons (the inspectors) would engage in an unlawful strike. It was asserted that the Local's expulsion of the inspectors from membership in the Local for the inspectors' performance of bargaining unit work as directed by the TTC and their refusal to engage in a strike that would be unlawful under this Act contravened section 78. The Board, however, is not persuaded by this analysis.

19. It is accurate to note that the definition of "strike" in the Act is "inclusive" in its terms. In the Board's view, the *inclusive* nature of the definition refers to the types of *activities* which may constitute a strike (such as the cessation of work, refusal to work or to continue to work or a slowdown or other concerted activity) rather than a reference to the *persons* who may so act. That is, a strike under the *Labour Relations Act* is conduct by *employees* in combination or concert or in accordance with a common understanding. And, for purposes of these proceedings, it is not in dispute that the inspectors are deemed not to be employees by virtue of section 1(3)(b) of the Act. The Board is not persuaded that the presence of the phrase "under this Act" modifying the term "unlawful strike" in section 78 and its absence from sections 74 and 76 broadens the scope of "unlawful strikes" encompassed by section 74 and 76 to include the instant circumstances. In short the *Labour Relations Act* provides a definition of the term "strike", sections 74, 76 and 78 are to be read with reference to that definition and the touchstone of that definition is conduct by *employees*. The inspectors are not "employees" within the meaning of the *Labour Relations Act*, as indicated earlier, for purposes of these proceedings.

20. The Board does not consider it useful or appropriate to import common law notions of what constitutes an unlawful strike into the *Labour Relations Act* in the face of a definition section in the Board's governing statute. Whether the cessation of work, or a refusal to perform bargaining unit work, by the inspectors even in concert (had such occurred) would constitute a "strike" at common law, is problematic and a question which the Board need not answer. For the Board's purposes, the Board is satisfied that such conduct would not have constituted a "strike" covered by the *Labour Relations Act* and, hence, the references to "unlawful strike" in the sections 74, 76 and 78 would not cover activity by persons excluded from the Act by virtue of section 1(3)(b). This conclusion is consistent with the jurisprudence which has held that the rights extended to "managerial" persons by the *Labour Relations Act* are severely restricted: see *Barbara Jarvis, supra* and paragraph 24, *infra*.

21. The Board, therefore, finds that the union has not contravened sections 74, 76 and 78. Whether there are other avenues for redress available to the TTC is not for this Board to determine. As noted, the TTC has initiated grievance proceedings which are currently adjourned *sine die*. Whether the collective agreement has been violated is a question for an arbitrator to determine.

mine. Whether the circumstances would give rise to a common law cause of action is for the courts to assess. What the Board has found is that sections 74, 76 and 78 are not breached by the Local's actions. Given its analysis, the Board need not determine whether an employer could, in other circumstances, succeed in a complaint alleging breach of section 78.

22. The Board next turns to the alleged violation of section 70. In the instant case, it is submitted that the union used intimidation or coercion to compel persons (the inspectors) to continue to be members of a trade union or to refrain from exercising any other rights under this Act. The essence of the argument by interveners' counsel is that the seniority rights granted to inspectors in the collective agreement became, by virtue of section 50, "rights under the Act" encompassed by the wording of section 70. *J. G. Rivard, supra*, was cited as support for this proposition. The Board disagrees that *J. G. Rivard, supra*, may be construed so broadly. That case, relying on *Imperial Tobacco Products (Ontario) Limited*, [1974] OLRB Rep. July 418, found that the counterpart in the construction industry provisions of section 50 made the provincial agreement binding, *inter alia*, on the employer bargaining agency and the employers represented by the employer bargaining agency. Thus, the non-payment of industry fund dues by an employer, contrary to its obligation under the collective agreement, is a deviation from the terms of that agreement contrary to [now] section 147(2). The substantive provisions of [now] section 147(2) were found to be available to the employer bargaining agency in grounding a request for relief under section 89 of the Act. The Board therein considered that the requirement to pay industry fund dues as analogous to the dues check-off provisions and held that there is a labour relations interest in ensuring the viability of employers' organizations and employer bargaining agencies. The payment of industry fund dues provided the basis for the viability of such organizations and agencies in the process of collective bargaining and in the administration and policing of collective agreements.

23. In the Board's view, there are no comparable labour relations considerations favouring an extension of the reasoning in *J. G. Rivard, supra*, to the instant case. First, the Board notes that section 50 does not operate to make the collective agreement binding on the inspectors who are neither parties to that agreement nor "employees in the bargaining unit" defined in the agreement. At best, it may be said that the inspectors are third party beneficiaries, outside the bargaining unit, of provisions negotiated between the employer and the trade union. This is a critical distinction rendering the reasoning in *J. G. Rivard, supra*, inapplicable to the instant case. Section 50 cannot be construed to create rights under the *Labour Relations Act* enforceable for the benefit of persons agreed to be "managerial" within the meaning of section 1(3)(b) of the Act (for purposes of this proceeding).

24. Further, the Board has held that the rights of managerial persons to obtain relief under the *Labour Relations Act* are quite limited as the following excerpt from *A.A.S. Telecommunications Ltd., supra*, indicates:

23. There remains the difficult question of the respondents' dismissal of Bird, assuming that she is a managerial employee. The prohibitions set out in section 58 [now 66] of the Act, protecting the right of individual employees to organize, do not extend as far as the managerial employee. The Board has recognized that the effect of *Associated Medical Services Ltd.*, (1964) 44 D.L.R. (2d) 407 was to restrict the meaning of the word "person" in section 58 to "employees" as defined by the Act. (See *Ottawa General Hospital (No.1)*, [1974] OLRB Rep. Mar. 193.) Managerial employees, since they are expressly excluded as employees, are not covered by the core of employee protections set out in section 58 [now 66]. In other words, these protections apply only to those persons entitled under the Act to join a union and to participate in its lawful activities.

24. Managerial employees, however, are not left completely unprotected by the *Labour Relations Act*. A limited protection has been extended to this group of persons by section 80 [now 90]. The Board has held that section 80 [now 90] not only extends to the managerial employee

remedial protection where there has been a violation of section 71 [now 80], but remedial protection where there has been a violation of any other provision of the Act. (See *Ottawa General Hospital (No. 1)*, *supra*.) This protection, however, is much more narrow than might appear from the fact [sic] of this proposition. The important limitation is that there must be a violation of a substantive provision of the Act before any remedial relief is available to the managerial employee, raising the question of the extent to which the managerial employee falls within the substantive protections of the Act.

25. Dealing with the issue of whether a managerial employee has any statutory right to become a member of a trade union and to participate in its lawful activities, the Board, in *Ottawa General Hospital (No. 2)*, [1974] OLRB Rep. Oct. 715, stated, at p. 723:

24. In our view, it would be repugnant to the whole scheme of the Act to conclude (as we would have to do if we were to accept the argument of counsel for the complainant) that a managerial person is given any such right by the Act. The broad language of section 3 - "Every person is free to join a trade union and to participate in its lawful activities" - must be read subject to the definition of "trade union" (section 1(1)(n) as an organization of "employees" and to section 1(3)(b) which says, in effect, that a managerial person is not an "employee" for the purposes of the Act. This is not to say that no one other than an employee, in this restricted sense, can join a trade union. One of the reasons, presumably, why "person" (rather than "employee") is used in section 3 is to enable a person not currently employed to become a member of a trade union. However, as we have said, it would be contrary to what we conceive to be the essential purpose and scheme of the Act to conclude that a managerial person has a protectable right to union membership.

The Board then went on to deal with the specific question of whether section 61 [now 70] of the Act was sufficiently wide to include managerial employees. At p. 726, the Board stated:

31. The fundamental premise of the complainant's argument is that a managerial person is free to join a trade union and to participate in its lawful activities (section 3 of the Act) and that that right is protected by section 61 [now 70]. Where, precisely, does that argument lead? Did the Legislature intend to confer upon a managerial person a protectable right to join an organization which has no legally enforceable right to represent him in collective bargaining? Does it follow, if the complainant's argument is accepted, that a managerial person can hold elective office in the union, participate in bargaining on its behalf, vote in ratification and strike votes, and, where the law otherwise permits join in strike action with other members of the union? We prefer a construction of the statute which avoids these questions.

The effect of this decision, and the earlier *Ottawa General Hospital* decision, is to narrowly restrict the remedial relief available to the managerial employee. The first decision made it clear that the protections of section 58 [now 66] do not apply to the managerial employee, while the second decision made it clear that the even more narrow protections of section 61 [now 70] could not be extended that far. In both cases, moreover, the extent of remedial relief available to the managerial employee under section 79 [now 89] was determined by defining the scope of substantive provisions of the Act, rather than by merely interpreting the remedial provision in the abstract.

26. The general remedial provision of the Act, section 79 [now 89], has been amended since these two decisions. See S.O. 1975, c. 76, s. 21. Did the amendment of this remedial provision extend the legal protections afforded to the managerial employee? The Board has already recognized that the source of such protections is found in the substantive provisions of the Act. The 1975 amendments, however, did not alter the substantive provisions of the Act so as to give the managerial employee a protectable right to join the union. The amendment of section 79 [now 89], therefore, only provided the Board with a wider and more comprehensive power to remedy conduct that already constituted a contravention of the Act, and in no way conferred any new substantive rights.

25. The analysis expressed in the jurisprudence, which the Board affirms, does not support

the argument advanced by interveners' counsel. Section 70 is not available for the benefit of persons excluded from the bargaining unit as managerial, particularly where the foundation of the statutory right which the persons in question are purportedly exercising is grounded in section 50, which has no application to the person in question. Again, the Board echoes its comments in paragraph 24 that the issue as to whether the collective agreement has been violated is not before this Board. Nor, it must be stressed, is the Board dealing at this juncture with the section 68 complaint filed by the inspectors and the Board makes no comment about that complaint.

26. Given the Board's findings, it is not necessary to deal with the respondent counsel's argument, in the alternative, to defer to arbitration.

27. For the foregoing reasons, the Board concludes that the respondent has not violated sections 70, 74, 76 or 78. Accordingly, the complaint is dismissed.

CONCURRING OPINION OF BOARD MEMBER W.H. WIGHTMAN: December 17, 1990

1. While I suspect the conclusion reached by my colleagues is correct at law I would be remiss not to express my concern with the decision, the effect of which would seem to discourage promotion levels from within the bargaining unit to supervisory levels.

2. The logic and desirability of promotion from within, particularly in the case of the operations people in a transit system, need hardly be described here. Nor is it difficult to conceive of many reasons, beyond the control of the parties involved, which could result in persons thus promoted becoming redundant and in anticipation of which event the parties would see it in their mutual interest to have made provision for their orderly return to the bargaining unit. Such arrangements are the norm and, in my experience, are not likely to be upset by the unions involved on the grounds that to do so could well foster internal dissent either on the part of those members who perceive their union to be foreclosing on promotion opportunities or those who would perceive the union action as punitive to those who might accept promotion. Moreover, such punitive action would be seen as a denial of traditional values unions have long held should be ascribed to the concept of "seniority".

3. It is unfortunate that the Board finds itself in the position of upholding this union in a course of action which on its face appears to be contrary to the interest of the union itself let alone its implications for the other parties involved.

1424-90-R; 1425-90-R International Union United Plant Guard Workers of America Local 1962, Applicant v. Zaidan Realty Corporation, Respondent

Certification - Employee - Practice and Procedure - Employee who verified time sheets and signed discharge letters not managerial - Employee not making final decisions - Board having no obligation under *Statutory Powers Procedure Act* to give written reasons for evidentiary ruling - Statutory obligation relating to final, not interim, decisions

BEFORE: Janice Johnston, Vice-Chair, and Board Members G. O. Shamanski and P. V. Grasso.

DECISION OF THE BOARD; December 17, 1990

1. Board Files No. 1424-90-R and 1425-90-R deal with an application for certification. By decision dated October 18, 1990 the Board issued a certificate dated October 5, 1990, to the International Union Plant Guard Workers of America Local 1962 ("the union") for all security guards employed by the respondent at West Lodge Ave., Toronto, save and except supervisors and persons above the rank of supervisor. The only remaining issue to be dealt with and the subject matter of this decision, is whether Mr. George Batchelor should be, as asserted by the union, included in the bargaining unit, or as the respondent Zaidan Reality Corporation ("the employer") asserts should be excluded pursuant to section 1(3)(b) of the *Labour Relations Act* (the Act). Section 1(3)(b) states:

1.-(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

(b) who, in the opinion of the Board, exercises managerial function or is employed in a confidential capacity in matters relating to labour relations.

2. In the *Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121, the Board summarised the basis for section 1(3)(b) and the general approach of the Board in deciding its applicability to a particular situation. The Board stated:

• • •

2. Section 1(3)(b) excludes from collective bargaining persons who in the opinion of the Board exercise managerial functions. The purpose of the section is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members or employees in the bargaining unit. Collective bargaining, by its very nature, requires an arm's length relationship between the "two sides" whose interests and objectives are often divergent. Section 1(3)(b) ensures that neither the trade union, nor that its members will have "divided loyalties". This purpose has been succinctly stated by the British Columbia Labour Relations Board in *Corporation of the District of Burnaby*, [1974] 1 CLRBR at page 3:

The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve counter-vailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management - on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of

those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for "cause" or passed over for promotion on the grounds of their "ability". The employer does not want management's identification in the activities of the employees union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm's length relationship between employer and union is to be preserved for the benefit of employees, the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it.

3. The labour Relations Act does not contain a definition of the term "managerial function", nor are there any specified criteria to guide the Board in reaching its opinion. The task of developing such criteria has fallen to the Board itself, and in recognition of the fact that the exercise of managerial functions can assume different forms in different work settings, the Board has, over the years, evolved various general approaches to assist it in its inquiry. In the case of so called "first line" managerial employees, the important question is the extent to which they make decisions which affect the economic lives of their fellow employees thereby raising a potential conflict of interest with them. Thus, the right to hire, fire, promote, demote, grant wage increases or discipline employees are all manifestations of managerial authority, and the exercise of such authority is incompatible with participation in trade union activities as an ordinary member of the bargaining unit. In the case of more senior managerial personnel whose decision-making may have a less direct or immediate impact on bargaining unit employees, the Board has focused on the degree of independent decision-making authority over important aspects of the employer's business. It is evident that persons making significant executive or business decisions should be considered a part of the "management team" even though they do not exercise the kind of direct authority over employees which is characteristic of a first line foreman.

4. *The line between "employee" and "management" is often shaded, and while it is helpful to consider the principles articulated by the Board in previous cases, ultimately the determination must turn on the facts of the particular case.* There is no litmus test which is universally applicable and dictates the result in every situation, and in assessing each case, the Board must have due regard to the nature of the industry, the nature of the particular business, and individual employer's organizational scheme. There must, of course, be a rational relationship between the number of superiors and subordinates, consultation or "input" should not be confused with decision-making, and neither technical expertise nor the importance of an employee's function can be automatically equated with managerial status. On the other hand, there may be individuals whose nominal authority appears to be limited, and who have no formal managerial position or title, but who nevertheless make recommendations affecting the economic destiny of their fellow employees which are so frequently forthcoming, and consistently followed by superiors, that it can be said that, in fact, the effective decision is made by the challenged individual. It is this type of recommendation which the Board has characterized as an "effective recommendation" and the inclusion of these persons in the bargaining unit would raise the very kind of conflict of

interest which section 1(3)(b) was designed to avoid. Persons making "effective recommendations" of this kind are regarded as part of the "management team", and are excluded from the bargaining unit.

5. In each instance, the Board seeks to determine the nature and extent of the individual's authority as well as the extent to which that authority is actually exercised. It is not sufficient if an individual has only "paper powers" contained in a job description or a "managerial" job title, if managerial functions are not actually exercised. Even the performance of certain co-ordinating functions may not be determinative. Where numbers of people work at a common enterprise (especially in the white collar - service sector) many persons may be engaged in co-ordinating activities which are largely routine, carried out within a pre-established framework of rules and policies, and subject to real managerial authority which is actually exercised from above. In addition, persons who perform technical functions or exercise craft skills which have been acquired through years of training and experience, will necessarily have a considerable influence over unskilled employees or less experienced "journeymen" or technicians. These experienced personnel will commonly supervise the work of those who are less experienced, and it is part of their normal job function to train and direct such persons and to instill good work habits. Often, it is only the most senior or skilled employees who will fully understand the technical requirements of the job and the tools and material required, and accordingly, it is they who will allocate work between themselves and the other employees in order to accomplish the task in a safe and efficient manner. In such circumstances, it is inevitable that they will have a special place on the "team" and will have a role to play in co-ordinating and directing the work of other employees; but this does not mean that they exercise managerial functions in the sense contemplated by section 1(3)(b) and must therefore be excluded from the ambit of collective bargaining - especially when most of their time is spent performing functions similar to those of other individuals in the bargaining unit and there is little or no evidence of the kind of conflict which section 1(3)(b) is designed to avoid.

...

[Emphasis added]

3. The Board in this case heard extensive and often contradictory evidence as to the duties and responsibilities of Mr. George Batchelor. We heard evidence as to his role in hiring, firing, setting schedules, approving overtime, authorizing time sheets, and designing workplace "rules" for the other security guards. It was agreed by both parties that Mr. Batchelor performed the work of a security guard, although there was no evidence on this point. Mr. Schwartz counsel for the employer conceded in final argument that 98% of Mr. Batchelor's time was taken up by security guard functions. It was the position of the employer however, that the supervisory duties performed by Mr. Batchelor were significant, and that he should be excluded from the bargaining unit pursuant to section 1(3)(b).

4. Mr. Batchelor was hired by and reported to Mr. Daniel Sigouin. Mr. Sigouin was employed as Director of Security by Mid-National Investments, a management company which employs all the employees who work in buildings owned by Zaidan Reality Corporation. Both Mr. Batchelor and Mr. Sigouin gave testimony as to the responsibilities of Mr. Batchelor and the manner in which he carried them out. While some of their testimony was consistent, in many areas it was not. The respective credibility of these two individuals is an assessment which is crucial to the determination of this matter. The Board has utilized the standard factors in reaching its conclusions as to whose evidence to accept in determining the facts of this case. Although Mr. Batchelor was present while Mr. Sigouin gave his evidence thereby offering him the opportunity to know the evidence he had to meet, the Board still prefers the evidence of Mr. Batchelor to that of Mr. Sigouin. Mr. Sigouin was evasive, and at times had difficulty remembering evidence not supportive of his position whereas Mr. Batchelor gave his evidence in a straightforward manner. In areas of conflict therefore, Mr. Batchelor's evidence is accepted by the Board.

5. Mr. Sigouin testified that Mr. Batchelor was involved in the hiring process and part of the decision making with regard to who should be hired. Mr. Batchelor testified that he merely handed out applications and was not involved in the hiring decision. The testimony of Mr. Walter Bugajski and Mr. Amir Abdelrahman, security officers hired while Mr. Batchelor was the Security Supervisor, support the position of Mr. Batchelor. The Board therefore, accepts the evidence of Mr. Batchelor and finds that he did not exercise a "managerial" role with respect to the hiring process.

6. Mr. Sigouin testified that Mr. Batchelor had authority with regard to the scheduling of the other security officers. The evidence of Mr. Batchelor indicated that employees were hired into set shifts and the only time the schedules changed was a result of the actions of Mr. Sigouin. Mr. Sigouin in cross examination admitted that he put out a new schedule in August. He admitted that he simply told Mr. Batchelor what the new schedule would be. It was Mr. Batchelor's testimony that he did not "approve" shift changes by the other security officers. He testified that if a security guard wanted time off it was the responsibility of that guard to arrange coverage of his shift with another guard. The guards would then inform him as to the arrangements. Mr. Sigouin conceded in cross examination that this occurred. We therefore conclude that Mr. Batchelor did not have the authority to set or amend the work schedules of the security officers employed at West Lodge Apartments.

7. Mr. Batchelor initialled the Employee Time Sheets of the other security officers. These time sheets indicated the hours worked by an employee over a two week period. The following example was provided:

WEST LODGE APARTMENTS

EMPLOYEE TIME SHEET

NAME: "CHRIS WHARTON"			PAY PERIOD: 07/30/90 08/12/90	
DATE	FROM	HOURS TO	TOTAL	EXPLANATION
07/30/90	1630	0030	8	
07/31/90	1630	0030	8	
08/01/90	1630	0030	8	
08/02/90	1630	0030	8	
08/05/90	1630	0030	8	
08/06/90	1630	0030	8	
08/07/90	1630	0030	8	
08/08/90	1630	0030	8	
08/09/90	1630	0030	8	
08/12/90	1630	0030	8	
			80	TOTAL HOURS

On the sample provided Mr. Batchelor's initials appear on the left hand side beside the dates worked by Mr. Wharton. Mr. Batchelor testified that his initials merely verified that an employee had in fact worked the hours indicated. Mr. Sigouin testified that Mr. Batchelor was responsible for verifying the times worked and then submitting the time sheets to Mary Vasic, the Property Manager at West Lodge Apartments, for approval. She approves them and sends them to accounting. We had no evidence presented to us of any occasion in which Mr. Batchelor and a security guard disagreed on the amount of time worked thereby establishing Mr. Batchelor's authority to overrule a security guard and determine the amount that individual would be paid. Merely verifying hours of work to be approved by someone else is not indicative of the kind of managerial func-

tion envisioned by 1(3)(b) of the Act. Mary Vasic in approving them for payment exerizes a management function.

8. It is our conclusion that Mr. Batchelor did not have the authority to approve overtime for the other security officers. Overtime was paid after 44 hours in accordance with the *Employment Standards Act*. Thus in a two week schedule overtime was payable after 88 hours of work. The employer published the following document under the letterhead of West Lodge Apartments.

WEST LODGE APARTMENTS

IMPORTANT NOTICE

TO All Security Guards,

Please follow your Regular Schedule and do not change your Schedule unless you have made prior arrangement with Security Director Daniel Sigouin.

Any Security Guards working 84 hours per every 2 weeks must have Daniel Sigouin's permission and over 88 hours per every 2 weeks *must* have Vicki Pelechaty's Permission.

Failure to comply with this notice could result in your immediate dismissal.

Thank you for your co-operation.

WEST LODGE APARTMENTS
MANAGEMENT

c.c. Vicki Pelechaty
Daniel Sigouin

Thus, regardless of whether the employer considered overtime to be worked in excess of 84 hours or 88 hours Mr. Batchelor could not approve it. This document also supports the Board's finding that Mr. Batchelor could not authorize changes to the work schedule.

9. Although Mr. Sigouin indicated that Mr. Batchelor had authority to set in place specific workplace rules, this never occurred. The draft rules prepared jointly by Mr. Batchelor and the other guards were never approved by Mr. Sigouin. Therefore, it is difficult to see how the employer can ascribed this authority to Mr. Batchelor.

10. The most controversial issue facing the Board was the role played by Mr. Batchelor in the discharge of certain employees. He wrote and signed the termination letters which were issued. It was his evidence that the decision to terminate was never his and that the authority to terminate security officers was vested in Mr. Sigouin. He indicated that in all terminations he was simply implementing a decision which had been made by Mr. Sigouin. Mr. Sigouin indicated that Mr. Batchelor had the authority to reach an independent decision and implement it, although he indicated that he could over rule this decision. Vicki Pelechaty the Operations Manager for Mid-National Investments, and Mr. Sigouin's superior, testified that Mr. Sigouin's role at West Lodge Apartments was to set up the staff on the project and to get involved when there were problems. It is our opinion that the firing of an employee would constitute "a problem" therefore it is hard to see how Mr. Sigouin could not be involved. Given our earlier stated conclusions with regard to credibility it is the Board's finding that Mr. Batchelor did not have the authority to make and implement an autonomous decision to discharge a security officer. Although Mr. Batchelor had input into the terminations he did not make the decisions. Mr. Sigouin made the decision and Mr. Batchelor acted as a conduit in advising the relevant employees of the decision.

11. As the Board's jurisprudence indicates it is not the individuals title or what the employer puts in a job description that is decisive in an inquiry as to whether an employee should or should not be a member of the bargaining unit. An individual will only be found not to be an employee for the purposes of the Act if he or she in fact performs duties which are managerial in their nature. It is clear to us that Mr. Batchelor does not perform managerial functions thereby resulting in his exclusion from the bargaining unit. It is obvious that Mr. Batchelor functions as a "lead hand" or "team leader". He coaches and trains new staff, co-ordinates the exchange of shifts, verifies hours worked and himself performs the job duties of a security officer.

12. For all of the above reasons it is our conclusion that Mr. Batchelor does not exercise those types of managerial functions which would result in the conflict of interest which section 1(3)(b) of the Act was designed to avoid. He is an employee within the meaning of the Act and ought to be included in the bargaining unit.

13. In the course of hearing this matter the panel made an interim ruling with regard to the admissibility of evidence which counsel for the employer sought to adduce in reply. We determined the evidence to be inadmissible. Counsel for the respondent by letter dated December 5, 1990 has requested with regard to this matter, that the Board supply him in writing with:

- (i) the position taken by counsel for Zaidan Reality Corporation;
- (ii) The position taken by counsel for the union applicant;
- (iii) the ruling and reasons of the Board.

He has also requested that the Board reconsider its decision as to the admissibility of this evidence.

14. Under section 106(1) of the Act the Board has the discretion to reconsider any decision it has made. This section reads as follows:

106.-1 The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

15. Practice Note No. 17 and the Board's jurisprudence, set out the basis upon which the Board normally exercises the discretion contained in section 106(1) (a copy of Practice Note No. 17 is appended to this decision for the benefit of the parties).

16. Counsel for the Respondent in his letter requesting reconsideration appears to be merely reiterating his submissions on the admissibility of the evidence of Mary Vasic. He has not raised any new arguments and seems to be simply re-arguing the issue. This request for reconsideration does not indicate that the Respondent wishes to make representations that he did not have a previous opportunity to raise. Clearly this request for reconsideration does not meet the standards set out in Practice Note No. 17. The request for reconsideration is therefore dismissed.

17. Before we leave this matter, however, we would like to point out that in the request for reconsideration, counsel for the respondent indicates that "it was the union's main witness who first raised the allegation that Mary Vasic was indirectly involved in the circumstances surrounding the terminations of employment of Mr. Tomes & Mr. Bugajski". This statement is inaccurate. The evidence shows clearly that counsel for the applicant in cross-examination of both Mr. Sigouin and

Ms. Pelechaty raised the issue of Ms. Vasic's involvement in the termination of security officers. In this case the respondent bore the onus of proving that Mr. Batchelor exercised managerial functions pursuant to section 1(3)(b) of the Act. We agree that Ms. Vasic's role vis a vis Mr. Batchelor is a central issue in these proceedings however, we feel her role should have been clarified in the respondent's case in chief. We also do not agree with counsel's statement that "in this particular organization, the Property Manager, Mary Vasic, had no managerial responsibility for security guards". The evidence does not support this statement.

18. Counsel has also requested written reasons for our ruling on the evidence of Ms. Mary Vasic. At the time of our ruling on the evidence, we provided oral reasons to the parties. We ruled that it was not proper reply evidence and that counsel for the respondent was attempting to split his case. He had been given every opportunity to call this witness in chief and had not done so. We therefore, decline at this point to provide written reasons for our evidentiary ruling. It is neither necessary nor would it be helpful for us to set out the lengthy submissions of both parties or our reasons for our ruling as requested by counsel. Section 17 of the *Statutory Powers Procedure Act* states:

A tribunal shall give its final decision and order, if any, in any proceedings in writing and shall give reasons in writing therefor if requested by a party.

The ruling in this case was an interim evidentiary ruling and not a "final decision or order" as contemplated by section 17. The Board is not required by statute to give written reasons for an interim decision. (see *3-L Filters Limited*, unreported, November 19, 1984).

19. This panel also has before it File No. 1735-90-U which deals with a complaint alleging a violation of section 89 of the Act. Hearings on this matter will continue on January 14, 15 and 16, 1991.

[Practice Note omitted - Editor]

COURT PROCEEDINGS

2636-87-R (Court File No. 1103/88) International Brotherhood of Electrical Workers, Local 594, Patrick Wyse and Maurice Walsh, Applicants v. International Brotherhood of Electrical Workers, Local 586, Respondents

Charter of Rights - Construction Industry - Judicial Review - Union Successor Status - Two locals of same union merged - Officers and members of one local opposed - Employer given status to intervene but not permitted to lead evidence on the consequences of the merger on its business operations - Merger in compliance with union constitution - Constitution not requiring membership approval - Divisional Court upholding Board decision - Failure to hold vote no infringement of Charter freedom of association - Board operated within limits of statutory discretion in making successor declaration

Board Decision Found at [1988] OLRB Rep. May 491 as J.S.H. Mueller Ltd.

Ontario Court of Justice, Divisional Court, O'Leary J., Southey J., Campbell J., December 4, 1990.

O'Leary J. (endorsement): The Board having satisfied itself that the International Brotherhood had acted within its constitution when it merged Local 594 into Local 586 so that Local 594 no longer existed, had in our view the discretion to make a successor declaration under sec. 62(1) of the Labour Relations Act, without taking any vote or otherwise satisfying itself that the former members of Local 594 supported either the merger or that a successor declaration be made.

Indeed in the circumstances here present the ordering of a vote would have been tantamount to an unwarranted interference in the internal workings of the International Brotherhood and would have left as the bargaining agent for the Renfrew electricians a local that the International Brotherhood had already decided no longer existed.

In our view the failure to order a vote cannot be said to have infringed the right to freedom of association guaranteed by the Charter of Rights, for the former members of Local 594 still choose to belong to the International Brotherhood and so presumably to be bound by its constitution, which constitution provides for no such vote on the merger of a local. The case does not involve any denial of the right to belong to the union of one's choice. Further we see no error in any of the Board's rulings in regard to the evidence proffered by any of the parties.

In our view the successor declaration was properly made. The application is dismissed with costs against the applicant in favour of Local 586 fixed at \$4,500.00.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING NOVEMBER 1990

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2824-89-R: IWA-Canada (Applicant) v. Saxon Athletic Manufacturing Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Brantford, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (74 employees in unit) (*Having regard to the agreement of the parties*)

3190-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Hydra Stream Inc. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry other than the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0326-90-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Deep Foundations Contractors Inc. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

0597-90-R: International Brotherhood of Painters & Allied Trades, Local 1824 (Applicant) v. Courtesy Group Inc. c.o.b. Courtesy Maintenance (Respondent)

Unit: "all journeymen and apprentices painters in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentices painters in the employ of the respondent in all sectors of the construction industry other than the industrial, commercial and institutional sector in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

0859-90-R: International Brotherhood of Painters & Allied Trades, Local 205 (Applicant) v. Nelson Desroches Regional Sandblasting & Painting Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of the respondent in the Regional Municipality of Niagara and that portion of the

Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1267-90-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Internazionale Electrical Contractors Ltd. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

1314-90-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Westlake Electrical Contractors Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1450-90-R: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Reno Marcon Plumbing & Heating Ltd. (Respondent)

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in all sectors of the construction industry in the the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1584-90-R: United Steelworkers of America (Applicant) v. Carr Steel Const. (1987) Ltd. (Respondent)

Unit: "all *shop* employees of the respondent in the City of Thunder Bay, save and except forepersons, persons above the rank of foreperson, office, and clerical staff, and all employees covered by subsisting collective agreements with the respondent" (10 employees in unit) (*Having regard to the agreement of the parties*)

1646-90-R: Amalgamated Clothing & Textile Workers Union (Applicant) v. Permark Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and sales staff, and students employed during the school vacation period" (19 employees in unit) (*Having regard to the agreement of the parties*)

1723-90-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Espanola Board of Education (Respondent)

Unit: "all office, clerical and technical employees of the respondent in the District of Sudbury, save and except supervisors, persons above the rank of supervisor, executive secretary to the Director of Education, secretary to the Superintendent of Business and persons in bargaining units for which any trade union held bargaining rights as of the date of application" (18 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1730-90-M: Graphic Communications International Union, Local 500M, Toronto (Applicant) v. Economy Web Printing Inc. (Respondent)

Unit: "all employees of the respondent in the City of St. Catharines, save and except production supervisors, persons above the rank of production supervisor, sales, office, editorial and advertising staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (19 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1731-90-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Showmart Management Ltd. (Respondent)

Unit: "all employees of the respondent at 370 King Street West in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales and administrative staff, security personnel, time keepers, front office staff, receivers and students employed during the school vacation period" (15 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1769-90-R: London & District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. The Corporation of the County of Grey (Respondent) v. Group of Employees (Objectors)

Unit #1: (see *Applications for Certification Withdrawn*)

Unit #2: "all employees of the respondent in its home or homes for the aged in the Village of Markdale regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff" (14 employees in unit) (*Having regard to the agreement of the parties*)

1770-90-R: Canadian Union of Public Employees (Applicant) v. The Town of Pickering Public Library Board (Respondent)

Unit #1: "all employees of the respondent in the Town of Pickering, save and except Branch Heads, persons above the rank of Branch Head, Administrative Assistant, Circulation Head, Pages, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (18 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in the Town of Pickering regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Branch Heads, persons above the rank of Branch Head, Administrative Assistant, Circulation Head and Pages" (50 employees in unit) (*Having regard to the agreement of the parties*)

1784-90-R: International Union of Operating Engineers, Local 793 (Applicant) v. Harnden & King Construction, A Division of George Wimpey Canada Ltd. (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors construction labourers and truck drivers in the respondent in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provincial County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

1785-90-R: Labourers' International Union of North America, Local 183 (Applicant) v. Vaughan Paving Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the County of Simcoe and the District

Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1812-90-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Airlane Motor Hotel Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Thunder Bay regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, office staff, persons employed to service banquets only, students employed during the school vacation period, and students employed in a co-operative training program" (78 employees in unit) (*Having regard to the agreement of the parties*)

1813-90-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Airlane Motor Hotel Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, office staff, persons employed to service banquets only, students employed during the school vacation period, and students employed in a co-operative training program, and persons regularly employed for not more than 24 hours per week" (174 employees in unit) (*Having regard to the agreement of the parties*)

1907-90-R: International Union United Automobile, Aerospace and Agricultural Workers of America, UAW (Applicant) v. K.S. Centoco Leather Wrap Ltd. (Respondent)

Unit: "all employees of the respondent at the Town of Essex, save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (2 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1918-90-R: United Food & Commercial Workers International Union, AFL:CIO:CLC: (Applicant) v. Peter Gorman & Sons (Wholesale) Ltd. (Respondent)

Unit: "all employees of the respondent in Peterborough, save and except foreman/managers, persons above the rank of foreman/manager, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (9 employees in unit) (*Having regard to the agreement of the parties*)

1942-90-R: Hotel, Clubs Restaurants, Taverns, Employees' Union, Local 261 (Applicant) v. Skyline Hotel (Respondent)

Unit: "all employees of the respondent in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office, clerical and front desk personnel, and persons in bargaining units for which any trade union held bargaining rights as of 23rd day of October 1990" (6 employees in unit)

1963-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. 604211 Ontario Inc. (Respondent)

Unit: "all employees of the respondent in the Town of Paris, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and students employed in a co-operative training program" (3 employees in unit) (*Having regard to the agreement of the parties*)

1998-90-R: Ontario Public School Teachers' Federation (Applicant) v. The Board of Education for the Borough of East York (Respondent)

Unit: "all occasional teachers as defined by section 1(1)31 of the *Education Act* employed by the respondent in its elementary panel in the Municipality of Metropolitan Toronto, save and except persons who, when they are employed as substitutes for teachers, are teachers as defined by the *School Boards and Teachers Collective Negotiations Act* in section 1(m)" (58 employees in unit) (*Having regard to the agreement of the parties*)

1999-90-R: Ontario Public School Teachers' Federation (Applicant) v. Red Lake Board of Education (Respondent) v. Group of Employees (Objectors)

Unit: "all library technicians and student assistants employed by the respondent in the District of Kenora, save and except the Director of Education and employees in bargaining units for which any trade union held bargaining rights as of October 31, 1990" (15 employees in unit) (*Having regard to the agreement of the parties*)

2028-90-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Rhucon (1988) Inc. (Respondent)

Unit: "all construction labourers in the employ of the respondent within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0096-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Victor Carpentry Ltd. (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 27 (Intervener)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	7
Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of intervener	0

1569-90-R: Owen Sound Glassworkers Union (Applicant) v. PPG Canada Inc. (Respondent) v. Aluminum, Brick & Glass Workers International Union (Intervener)

Unit: "all employees of PPG Canada Inc. Glass Division, at its manufacturing plant in Owen Sound, save and except foremen, persons above the rank of foreman, office, and sales staff" (290 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	290
Number of persons who cast ballots	251
Number of ballots marked in favour of applicant	232
Number of ballots marked in favour of intervener	19

1581-90-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. Ford Motor Company of Canada, Ltd. (Respondent) v. International Union of Operating Engineers, Local 796 (Intervener)

Unit: "all stationary engineers, boilerhouse service persons, pump and compressor mechanics, instrument mechanics and waste disposal and minor maintenance, persons employed at the Company's Oakville boilerhouse, save and except supervisors, persons above the rank of supervisor and confidential clerks" (25 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	23
Number of ballots marked in favour of applicant	18
Number of ballots marked in favour of intervener	5

Applications for Certification Dismissed Without Vote

0723-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Maple Engineering & Construction Canada Ltd. (Respondent) v. Christian Labour Association of Canada (Intervener) (52 employees in unit)

2872-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Structural Contracting Ltd. (Respondent) v. The Operative Plasterers & Cement Masons International Association of the United States of America, Local 598 (Intervener) (40 employees in unit)

1689-90-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Glen Co. Contracting Ltd. (Respondent) v. Group of Employees (Objectors) (13 employees in unit)

1905-90-R: United Steelworkers of America (Applicant) v. Atlas Alloys, A Division of Rio Algoma Ltd. (Respondent) v. Group of Employees (Objectors) (170 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

3149-89-R: Labourers' International Union of North America, Local 1089 (Applicant) v. Doug Chalmers Construction Ltd. (Respondent) v. Operative Plasterers' & Cement Masons International Association of the United States and Canada (Intervener #1) v. Local Union 598 of the Operative Plasterers' & Cement Masons International Association of the United States and Canada (Intervener #2) v. The Provincial Conference of Ontario of the Operative Plasterers' & Cement Masons International Association of the United States and Canada (Intervener #3)

Unit: "all working foremen, journeymen and apprentice cement masons and waterproofers engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario" (2 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	1
Number of ballots marked in favour of intervener	2

3161-89-R: Labourers' International Union of North America, Local 1089 (Applicant) v. Curran Contractors Ltd. (Respondent) v. Operative Plasterers' & Cement Masons International Association of the United States and Canada (Intervener #1) v. Local Union 598 of the Operative Plasterers' & Cement Masons International Association of the United States and Canada (Intervener #2) v. The Provincial Conference of Ontario of the Operative Plasterers' & Cement Masons International Association of the United States and Canada (Intervener #3)

Unit: "all working foremen, journeymen and apprentice cement masons and waterproofers engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario" (2 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	1
Number of ballots marked in favour of intervener	2

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1479-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. St. Catharines Machine Products Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in St. Catharines, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and stu-

dents employed during the school vacation period" (108 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	109
Number of persons who cast ballots	107
Number of ballots marked in favour of applicant	44
Number of ballots marked against applicant	60
Ballots segregated and not counted	3

1715-90-R: United Steelworkers of America (Applicant) v. Atlas & Civic Employees (Niagara Region) Credit Union Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all office and clerical employees of the respondent in the City of Welland, save and except accounting supervisors, persons above the rank of accounting supervisor" (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	6

Applications for Certification Withdrawn

0807-89-R: Carleton University Security Officer's Association (Applicant) v. Carleton University (Respondent)

3027-89-R; 3028-89-R: The Operative Plasterers & Cement Masons International Association of the United States of America, Local 598 (Applicant) v. Structural Contracting Ltd., Structural Flooring Finishing Ltd., Struct-Form International Ltd. (Respondents)

0558-90-R: International Brotherhood of Painters & Allied Trades, Local 1824 (Applicant) v. Courtesy Group Inc. c.o.b. Courtesy Maintenance (Respondent)

1358-90-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. B.E.S.T. Construction Inc. (Respondent)

1620-90-R: International Brotherhood of Electrical Workers, Local 115 (Applicant) v. Four-O-One Electric Ltd. (Respondent)

1847-90-R: Pattern Makers' League for North America (Applicant) v. Mitchell Geometric Pattern & Models Inc. (Respondent)

1848-90-R: Canadian Union of Public Employees (Applicant) v. The Hamilton-Wentworth Roman Catholic Separate School Board (Respondent)

1863-90-R: Labourers' International Union of North America, Local 183 (Applicant) v. Toronto Zenith Contracting (1982) Ltd. (Respondent)

1877-90-R: Hotels, Clubs, Restaurants & Taverns Employees Union, Local 261 (Applicant) v. Skyline Hotel (Respondent)

1971-90-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Essex County of Education (Respondent)

2019-90-R: International Brotherhood of Painters & Allied Trades, Local 1793 Glaziers (Applicant) v. Low's Glass & Mirror Co. Ltd. (Respondent) v. Christian Labour Association of Canada (Intervener)

2194-90-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Palisade Homes Ltd. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

1188-90-FC: Local 2693, IWA-Canada (Applicant) v. Atway Transport Inc. (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2527-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Century Store Fixtures Ltd., Century Interiors Ltd., Jasper Construction Inc. (Respondents) (*Dismissed*)

1010-89-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Deluxe Electrical Contractor Ltd., Duplex Electrical Ltd. (Respondents) (*Dismissed*)

2301-89-R: United Steelworkers of America (Applicant) v. 849973 Ontario Ltd. o/a Mr. Crispy's and/or Mr. Crispy's Ltd. (Respondents) (*Granted*)

2302-89-R: United Steelworkers of America (Applicant) v. General Freezer Ltd. and 849973 Ontario Ltd. o/a Mr. Crispy's and/or Mr. Crispy's Ltd. (Respondents) (*Granted*)

2791-89-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Andreynolds Company Ltd. and Bill Bailey of Belleville Ltd. (Respondents) (*Dismissed*)

1246-90-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Farmer Fabrication Ltd. and 894689 Ontario Inc. c.o.b. as Ranfar Steel (Respondents) (*Withdrawn*)

1553-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 195 (Applicant) v. Tecumseh Metal Products Inc. and B.F.W. Assemblies Inc. (Respondent) (*Withdrawn*)

1800-90-R: United Food & Commercial Workers International Union, Local 175, AFL:CIO:CLC: (Applicant) v. Carewell Corporation c.o.b. Bracebridge Villa; 870860 Ontario Ltd. and Healthview Ltd. (Respondents) (*Withdrawn*)

1860-90-R: International Ladies Garment Workers' Union, Locals 14, 83 & 92 (Applicant) v. Jac-An Formals Ltd. and 791915 Ontario Ltd. c.o.b. as Paradise Fashions (Respondents) (*Granted*)

SALE OF A BUSINESS

1010-89-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Deluxe Electrical Contractor Ltd., Duplex Electrical Ltd. (Respondents) (*Dismissed*)

2301-89-R: United Steelworkers of America (Applicant) v. 849973 Ontario Ltd. o/a Mr. Crispy's and/or Mr. Crispy's Ltd. (Respondents) (*Granted*)

2302-89-R: United Steelworkers of America (Applicant) v. General Freezer Ltd. and 849973 Ontario Ltd. o/a Mr. Crispy's and/or Mr. Crispy's Ltd. (Respondents) (*Granted*)

2790-89-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Andreynolds Company Ltd. and Bill Bailey of Belleville Ltd. (Respondents) (*Dismissed*)

1247-90-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Farmer Fabrication Ltd. and 894689 Ontario Inc. c.o.b. as Ranfar Steel (Respondents) (*Withdrawn*)

1800-90-R: United Food & Commercial Workers International Union, Local 175, AFL:CIO:CLC: (Applicant) v. Carewell Corporation c.o.b. Bracebridge Villa; 870860 Ontario Ltd. and Healthview Ltd. (Respondents) (*Withdrawn*)

1860-90-R: International Ladies Garment Workers' Union, Locals 14, 83 & 92 (Applicant) v. Jac-An Formals Ltd. and 791915 Ontario Ltd. c.o.b. as Paradise Fashions (Respondents) (*Granted*)

CROWN TRANSFER ACT

0306-90-R: Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario as represented by the Ministry of Community & Social Services, Community Services in Hastings & Lennox & Addington (Respondent) (*Granted*)

UNION SUCCESSOR RIGHTS

1470-90-R; 1471-90-R: Brewery, Malt & Soft Drink Workers, Local 304 (Applicant) v. Ontario Nurses' Association (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0188-90-R: Victor Ratelle (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 1316 (Respondent) v. Kap's Interiors Contracting Ltd. (Intervener) (*Withdrawn*)

0229-90-R: Douglas M. Garvie (Applicant) v. International Brotherhood of Electrical Workers, and the I.B.E.W. Construction Council of Ontario, Local 586 (Respondent) v. Electro Systems a Division of 433281 Ontario Inc. (Intervener) (2 employees in unit) (*Dismissed*)

0246-90-R: Klaus Willroider (Applicant) v. International Brotherhood of Electrical Workers, International Brotherhood of Electrical Workers Construction Council of Ontario; International Brotherhood of Electrical Workers, Locals 105, 115, 120, 303, 353, 402, 530, 586, 773, 804, 894, 1687, & 1739 (Respondents) v. Lorne's Electric - 291360 Ontario Ltd. (Intervener)

Unit: "all journeymen and apprentice electricians and journeymen and apprentice linemen in the employ of Lorne's Electric - 291360 Ontario Ltd. in the industrial, commercial and institutional sector of the construction industry in the province" (1 employee in unit) (*Granted*)

Number of names of persons on revised voters' list	1
Number of persons who cast ballots	1
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	1

0988-90-R: Jean Paul LeRoux (Applicant) v. Local 848, Energy & Chemical Workers Union (Respondent) v. Chinook Chemicals Company (Intervener)

Unit: "all employees of Chinook Chemicals Company employed as long haul truck drivers, working at or out of its plant in Sombra, Ontario, save and except supervisors, persons above the rank of supervisor, technical innovation personnel, office and sales staff, persons employed in a co-operative training program in a recognized university, college or school, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of the 31st day of August, 1987" (12 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	12
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Number of persons who cast ballots	10
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	9
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	6

1101-90-R: All Operating Engineers & Boiler Room Employees (Applicant) v. International Union of Operating Engineers, Local 796 (Respondent) v. Quaker Oats Company of Canada Ltd. (Intervener) (5 employees in unit) (*Granted*)

1149-90-R: Tom Scoria (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75 (Respondent) v. Dining Concepts Inc. c.o.b. as Pia Zettis (Intervener)

Unit: "all employees of the unit (respondent), save and except supervisors, persons above the rank of supervisor, office and sales staff, accounting staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (4 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3

1461-90-R: Cathy Middleton & Kenneth MacLean (Applicants) v. International Union of Operating Engineers, Local 793 (Respondent) v. Medigas Inc. (Intervener) (7 employees in unit) (*Dismissed*)

1497-90-R: Roxanne Pickering and Dana Gletnak (Applicants) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Respondent) v. Purolator Manufacturing Ltd. (Intervener) (24 employees in unit) (*Granted*)

1589-90-R: Ray Wark George Goettler (Applicants) v. United Food & Commercial Workers International Union, Local 633 (Respondent) v. Blue Mountain I.G.A. (Intervener) (*Withdrawn*)

1846-90-R: Dina Paladino (Applicant) v. Union of Bank Employees, Local 2104 (Respondent) v. National Trust Company (Intervener) (5 employees in unit) (*Granted*)

1920-90-R: Toronto Humane Society (Applicant) v. Canadian Union of Public Employees (Respondent) (40 employees in unit) (*Granted*)

1979-90-R: Edward Logan et al. (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 195 (Respondent) v. Pressed Steel Products (Windsor) Ltd. (Intervener) (5 employees in unit) (*Granted*)

2035-90-R: Willie Coppens (Applicant) v. United Steelworkers of America (Respondent) v. Architectural School Products (Intervener) (11 employees in unit) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0750-90-U: Bectar Corporation (Applicant) v. Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, and International Union of Bricklayers & Allied Craftsmen, Local 7 (Respondent) (*Withdrawn*)

2018-90-U: Creedan Valley Nursing Home Ltd. (Applicant) v. Canadian Union of Public Employees, Local 3114, Bonnie Haight (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2533-88-U; 2054-89-U; 2354-89-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Ontario Bus Industries Inc. (Respondent) (*Withdrawn*)

2632-88-U; 3005-89-U; 1099-90-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Venture Industries Canada Ltd. (Respondent) (*Withdrawn*)

2874-88-U: Robert Racki (Complainant) v. International Union, United Plant Guard Workers of America, Local 1962 (Respondent) v. The Governing Council of the University of Toronto (Intervener) (*Dismissed*)

0083-89-U: J-M Theriault et al. (Complainants) v. C.U.P.E., Local 6, Regional Municipality of Sudbury, City of Sudbury (Respondents) (*Dismissed*)

0114-89-U; 0757-89-U: United Food & Commercial Workers International Union, Local 296 (Complainant) v. Knob Hill Farms Ltd. (Respondent) (*Withdrawn*)

0866-89-U: Knob Hill Farms Ltd. (Complainant) v. United Food & Commercial Workers International Union, Local 206 and Demitrius Pyrgos (Grievor) (Respondents) (*Withdrawn*)

1609-89-U: International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada, Local 357 (Complainant) v. Woodstocks Amusements Inc.; Stratford Amusements Inc. (Respondent) (*Withdrawn*)

1656-89-U: IWA-Canada, Local 1-500 (Complainant) v. Simmons Ltd. (Upholstry Products Division, Elora) (Respondent) (*Withdrawn*)

2154-89-U: Bruce H. Bryer (Complainant) v. Toronto Transit Commission & Amalgamated Transit Union, Local 113 (Respondents) (*Dismissed*)

3040-89-U: IWA-Canada (Complainant) v. Saxon Athletic Manufacturing Inc. (Respondent) v. Group of Employees (Objectors) (*Withdrawn*)

3097-89-U; 3163-89-U: Labourers' International Union of North America, Local 183 (Complainant) v. International Union of Operating Engineers, Local 793 (Respondent) (*Dismissed*)

0109-90-U: Kiflay Yemaneab (Complainant) v. St. Joseph Health Centre (Respondent) v. Canadian Union of Public Employees, Local 1144 (Intervener) (*Dismissed*)

0164-90-U: IWA-Canada, Local 2693 (Complainant) v. Paramount Transportation Ltd. (Respondent) (*Withdrawn*)

0269-90-U: Nicolas Turcotte (Complainant) v. Drywall, Acoustic, Lathing & Insulation, Local 675 (Respondent) (*Withdrawn*)

0361-90-U; 0362-90-U: Ontario Nurses' Association (Complainant) v. Reliacare Inc. c.o.b. Port Dover Health Care Centre (Respondent) (*Withdrawn*)

0403-90-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Complainant) v. Sears Canada Inc. (Respondent) (*Withdrawn*)

0462-90-U: Donald Anderson and Mary Sutton (Complainants) v. United Food & Commercial Workers International Union, Locals 175 & 633 (Respondents) v. Loblaw's Supermarkets Ltd. (Intervener #1) v. Canadian Commercial Workers Industry Pension Plan (Intervener #2) (*Withdrawn*)

0494-90-U: Tom Ernikos (Complainant) v. Bill Emberly, Angelo Zarb, Ray Bowman and Canadian Paperworkers Union, Local 1872 (Respondent) v. Canadian Pacific Forest Products Ltd. (Intervener) (*Withdrawn*)

0521-90-U: Bricklayers, Masons Independent Union of Canada, Local 1 (Complainant) v. New Lomar General Contractors Ltd. (Respondent) (*Granted*)

0557-90-U: Karen Marion (Complainant) v. Huronia District Hospital (Respondent) v. Service Employees' International Union, Local 204 (Respondent Trade Union) (*Dismissed*)

0760-90-U: Ontario Public Service staff Union (Complainant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

0769-90-U: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Vanderbilt Industrial Contracting Corp. and Industrial Overload Inc. c.o.b. as Drake Industrial Overload (Respondents) (*Withdrawn*)

0964-90-U: Ontario Public Service Employees Union (Complainant) v. The Windsor Roman Catholic Separate School Board (Respondent) (*Withdrawn*)

1008-90-U: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Premdor Inc. (Respondent) (*Withdrawn*)

1051-90-U: Kevin Reed (Complainant) v. International Sheet Metal Workers', Local 540 (Respondent) v. S.W. Fleming Ltd. (Intervener) (*Dismissed*)

1217-90-U: Ontario District Council - Locals 14, 83 and 92 of the International Ladies Garment Workers' Union (Complainant) v. Lady Manhattan of Canada (Respondent) (*Withdrawn*)

1277-90-U: International Union of Operating Engineers, Local 793 (Complainant) v. Gordon Trailer Sales & Rentals Ltd. (Respondent) (*Withdrawn*)

1379-90-U: International Brotherhood of Electrical Workers, Local 353 (Complainant) v. Internazionale Electrical Contractors Ltd. (Respondent) (*Withdrawn*)

1484-90-U: Retail, Wholesale & Department Store Union (Complainant) v. Reid's Dairy (Respondent) (*Withdrawn*)

1501-90-U: International Brotherhood of Electrical Workers, Local 353 (Complainant) v. Westlake International Contractors Ltd. (Respondent) (*Withdrawn*)

1519-90-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 195 (Applicant) v. Rustshield Plating Ltd. (Respondent) (*Withdrawn*)

1539-90-U: Grace Marie Sage (Complainant) v. Canadian Union of Public Employees, Local 1263 (Respondent) (*Withdrawn*)

1654-90-U: Labourers' International Union of North America, Ontario Provincial District Council (Complainant) v. Lume Masonry Ltd. (Respondent) (*Granted*)

1667-90-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Jacques Belle-Isle Wholesale Cash & Carry Ltd. (Respondent) (*Withdrawn*)

1778-90-U; **1798-90-U:** Nita Kohli (Complainant) Allders International Duty Free and S.E.I.U., Local 204 (Respondents) (*Withdrawn*)

1797-90-U; **1798-90-U:** United Food & Commercial Workers International Union, Local 175, AFL:CIO:CLC: (Complainant) v. 870860 Ontario Ltd. (Respondent) (*Withdrawn*)

1802-90-U: Service Employees' Union, Local 210 (Complainant) v. Leamington Lodge (Respondent) (*Withdrawn*)

1811-90-U; 1839-90-U; 1914-90-U; 1964-90-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Airlane Motor Hotel Ltd. (Respondent) (*Withdrawn*)

1815-90-U: Ontario Public Service Employees Union (Union Grievance - Workload) (Complainant) v. Northern College (Respondent) (*Withdrawn*)

1822-90-U: United Food & Commercial Workers International Union (Complainant) v. Primo Foods Ltd. (Respondent) (*Withdrawn*)

1823-90-U; 1824-90-U; 1842-90-U: Service Employees Union, Local 183 (Complainant) v. Gibson Holdings (Ontario) Ltd., and Tim Gibson and Larry Gibson (Respondents) (*Withdrawn*)

1829-90-U: United Brotherhood of Carpenters & Joiners of America, Local 446 (Complainant) v. Penn-Co Construction Ltd. and Christian Labour Association of Canada (Respondents) (*Withdrawn*)

1868-90-U: Lena Bolt (Complainant) v. Cara Flight Kitchen No. 2 (Respondent) (*Withdrawn*)

1881-90-U: Service Employees Union, Local 210 (Complainant) v. Salvation Army Grace Hospital (Respondent) (*Withdrawn*)

1882-90-U: Bricklayers, Masons Independent Union of Canada, Local 1 (Complainant) v. Masonry Contractors' Association of Toronto Inc. (Respondent) (*Withdrawn*)

1904-90-U: Fernand Beaudry & Gaston Rainville (Complainants) v. Business Agent - Labourers' Union, Local #247, Kingston, Ontario (Respondent) (*Withdrawn*)

1921-90-U: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Complainant) v. Amapor Holdings Inc. (Respondent) (*Withdrawn*)

1934-90-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Complainant) v. Sears Canada Inc.; Betty Moncrief (Respondents) (*Withdrawn*)

1995-90-U: Alberto Nasato (Complainant) v. Ceedee Capital Corporation (Respondent) (*Dismissed*)

2004-90-U: Eaton Davies (Complainant) v. Amalgamated Transit Union, Local 1587 (Respondent) (*Dismissed*)

2048-90-U: Monte L. Hennessy (Complainant) v. Workmans Compensation Board and Gay Const. Ltd. (Respondent) (*Withdrawn*)

2056-90-U: Canadian Union of Public Employees , Local 1144 (Complainant) v. St. Joseph's Health Centre (Respondent) (*Withdrawn*)

2075-90-U: Harbour Castle Banquet Service Staff (Complainant) v. Harbour Castle Westin Management (Respondent) (*Dismissed*)

2199-90-U: Diane Azzopardi (Complainant) v. Paperworker Union, Local 1646 (Respondent) (*Dismissed*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2020-90-M: Penthouse Restaurant, 717402 Ontario Inc. (Employer) v. Hotel, Motel & Restaurant Employees Union, Local 442 (AFL-CIO, CLC) (Trade Union) (*Granted*)

FINANCIAL STATEMENT

3218-89-M: John Kozak Member of Local 27 United Brotherhood of Carpenters & Joiners of America (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local 27 (Respondent) (*Withdrawn*)

0369-90-M: John Kozak, Member of Local 27, United Brotherhood of Carpenters & Joiners of America (Complainant) v. Manion, Wilkins & Associates Ltd. Officers of the Trust Fund, for Carpenters' Local 27 (Respondent) (*Withdrawn*)

1788-90-M: Louis B. Frechette (Complainant) v. Local 491 Labourers' International Union of North America (Respondent) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

3250-89-M: Hotels, Clubs, Restaurant, Taverns Employees Union, Local 261 (Applicant) v. Cafe Contempra (Respondent) (*Withdrawn*)

0758-90-M: The Corporation of the County of Hastings (Applicant) v. C.U.P.E., Local 1665 (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1614-89-OH: Douglas Janson (Complainant) v. Catalytic Maintenance Inc. (Respondent) (*Withdrawn*)

2281-89-OH: J. L. Margetts (Complainant) v. The Queen in Right of Ontario (Ministry of Correctional Services) (Respondent) (*Withdrawn*)

3032-89-OH: Deborah Brown (Complainant) v. Treford Automobile Ltd., Robert Treford (Respondents) (*Granted*)

0107-90-OH: Manuel Puche (Complainant) v. Bo Ramjit (Respondent) (*Granted*)

1311-90-OH: James Allen Boyce (Complainant) v. Union Electric Supply Co. Ltd. (Respondent) (*Withdrawn*)

1684-90-OH: Grant Gordon Meseck (Applicant) v. Lasalle Packaging & Robert Wood (Respondent) (*Withdrawn*)

1864-90-OH: Diane Lois Way (Complainant) v. Ridout & Maybee, a partnership, and Godfrey P. Orleans, A. Leonard Grove, P. Ewan McArdle, Richard A. R. Parsons, Philip K. Holland, and James R. Lake, partners in the Respondent partnership (Respondents) (*Withdrawn*)

1911-90-OH: Labourers' International Union of North America, Local 506, Ingram (Butch) Byard and Duncan McMullen (Complainants) v. Costa Building Supply Ltd. (Respondent) (*Withdrawn*)

COLLEGES COLLECTIVE BARGAINING ACT

0368-89-U; 0369-89-U; 0857-89-U: Anna Wilson (Complainant) v. Ontario Public Service Employees Union, Local 110 (Respondent) v. Fanshawe College and the Ontario Council of Regents for Colleges of Applied Arts & Technology (Interveners) (*Dismissed*)

1344-90-U: L. David Benhaggai (Complainant) v. Douglas E. Light, President, George Brown College, James Ross, Earl Walker, Yvonne Snider, Sally Layton, Mary White, James Turner (Respondents) v. Ontario Public Service Employees Union (Intervener) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

1780-89-G: International Brotherhood of Painters & Allied Trades (Applicant) v. The Electrical Power Systems Construction Association - Ontario Hydro (Respondent) (*Dismissed*)

0142-90-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Applicant) v. Marc Mechanical Ltd. (Respondent) (*Granted*)

0700-90-G: United Brotherhood of Carpenters & Joiners of America, Local 1669 (Applicant) v. D & D Maintenance (Respondent) (*Withdrawn*)

0973-90-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. 410385 Ontario Ltd. (Respondent) (*Withdrawn*)

1119-90-G; 1120-90-G; 1121-90-G; 1122-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Marlborough Construction Ltd., Appia Construction Ltd., Star Wall Concrete Forming Ltd. (Respondents) (*Granted*)

1146-90-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 765 (Applicant) v. Ellis-Don Construction Ltd. (Respondent) (*Withdrawn*)

1245-90-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Farmer Fabrication Ltd. and 894689 Ontario Inc. c.o.b. as Ranfar Steel (Respondents) (*Withdrawn*)

1285-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. G. W. Barr Construction & Engineering Ltd. (Respondent) (*Granted*)

1317-90-G, 1318-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. John Munharry's Rentals Ltd. (Respondent) (*Granted*)

1332-90-G; 1333-90-G; 1334-90-G; 1335-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Farry Excavating & Grading Ltd. (Respondent) (*Granted*)

51351-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Dawn Enterprises (Respondent) (*Withdrawn*)

1399-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. State Contractors, A Division of Bracknell Corporation (Respondents) (*Withdrawn*)

1516-90-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Dufferin Roofing Co. Ltd. (Respondent) (*Withdrawn*)

1545-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Aldershot Flooring Ltd. (Respondent) (*Granted*)

1573-90-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. New Generation Drywall Ltd. (Respondent) (*Withdrawn*)

1611-90-G: United Brotherhood of Carpenters & Joiners of America, Local 1316 (Applicant) v. Ravata Drywall & Acoustics Ltd. (Respondent) (*Granted*)

1639-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Sir Forming Ltd. (Respondent) (*Granted*)

1675-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. G. W. Barr Construction & Engineering Ltd. (Respondent) (*Withdrawn*)

1676-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Menkes Properties (Respondent) (*Withdrawn*)

1682-90-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Valley Interiors (Respondent) (*Withdrawn*)

1695-90-G: International Brotherhood of Electrical Workers Construction Council of Ontario (Applicant) v. Dominion Bridge - Ontario (Respondent) (*Granted*)

1794-90-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Roch Cayer Ltd. (Respondent) (*Granted*)

1795-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Rex Forming Ltd. (Respondent) (*Granted*)

1796-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Bot Construction (Canada) Ltd. (Respondent) (*Withdrawn*)

1805-90-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. 854858 Ontario Inc. (Respondent) (*Granted*)

1817-90-G: Labourers' International Union of North America, Local 506 (Applicant) v. Eastern Construction Company Ltd. (Respondent) (*Withdrawn*)

1828-90-G: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. John's Flooring & Contracting Ltd. (Respondent) (*Granted*)

1853-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. 850239 Ontario Inc. (Respondent) (*Granted*)

1862-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Andy's Excavating Ltd. (Respondent) (*Granted*)

1873-90-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. K.D. Acoustics (Respondent) (*Granted*)

1875-90-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Huffman Bros. Welding Ltd. (Respondent) (*Withdrawn*)

1889-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. North York Construction Ltd. (Respondent) (*Withdrawn*)

1890-90-G: International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 91 (Applicant) v. O'Leary's Ltd. (Respondent) (*Withdrawn*)

1894-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Cooper Corporation Ltd. (Respondent) (*Withdrawn*)

1912-90-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. The Bratti Group and Bratti Mechanical Inc. (Respondents) (*Granted*)

1913-90-G: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Mag Drywall (1983) Ltd. (Respondent) (*Granted*)

1925-90-G: International Association of Heat & Frost Insulators & Asbestos Workers, Local 95 (Applicant) v. D & F Insulation Ltd. (Respondent) (*Granted*)

1950-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Lamco Construction Co. (Respondent) (*Granted*)

1957-90-G: Labourers' International Union of North America, Local 837 (Applicant) v. Formrite Inc. (Respondent) (*Withdrawn*)

1973-90-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 221 (Applicant) v. Lewin Kingston Division of Brousseau & Robidoux Enterprises Ltd. (Respondent) (*Granted*)

1976-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. San-Lee Construction Ltd. (Respondent) (*Granted*)

1977-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Teskey Construction Co. Ltd. (Respondent) (*Withdrawn*)

1982-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Fermar Paving Ltd. (Respondent) (*Withdrawn*)

1992-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Land Excavating & Grading Co. Division of 590812 Ontario Ltd. (Respondent) (*Granted*)

1994-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Con-Drain Company (1983) Ltd. (Respondent) (*Withdrawn*)

2016-90-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Lackie Industrial Contractors Ltd. (Respondent) (*Withdrawn*)

2031-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Florida Ceiling (Respondent) (*Withdrawn*)

2036-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Canadian Store Fixtures Inc. (Respondent) (*Withdrawn*)

2037-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Durham Contracting Ltd. (Respondent) (*Withdrawn*)

2038-90-G: International Brotherhood of Painters & Allied Trades, Local 200 (Applicant) v. Preston & Lieff Glass Ltd. (Respondent) (*Granted*)

2046-90-G: United Brotherhood of Carpenters & Joiners of America, Lake Ontario District Council (Applicant) v. Jackson - Lewis Company Ltd. (Respondent) (*Granted*)

2065-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Domingo's Construction 845288 Ontario Ltd. (Respondent) (*Withdrawn*)

2069-90-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Mag Drywall Ltd. (Respondent) (*Granted*)

2071-90-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. D'Angelo Plastering Co. Ltd. (Respondent) (*Withdrawn*)

2079-90-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Standard Underground (Respondent) (*Withdrawn*)

2081-90-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Downsview Drywall (Respondent) (*Withdrawn*)

2082-90-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Symmetrical Drywall Interiors Ltd. (Respondent) (*Granted*)

2093-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Ernie Keis Floorcoverings Ltd. (Respondent) (*Granted*)

2094-90-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Gulf Lathing & Drywall Company (Respondent) (*Granted*)

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2148-90-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Matthews Contracting Inc. (Respondent) (*Withdrawn*)

2157-90-G: Labourers' International Union of North America, Local 247 and Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Tandec Construction Inc./T.F. Construction Ltd. (Respondent) (*Withdrawn*)

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2895-88-U: The Coalition of Laid-off Workers, Ontario, Canada. Hereinafter known as the C.L.W. (Complainant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada. Herein-after known as the C.A.W., Locals 439 & 458 of the C.A.W. (Respondents) v. Varity Corporation (Intervenor) (*Dismissed*)

2202-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Toronto Structural Concrete Services Ltd. (Respondent) v. Operative Plasterers & Cement Masons International Association of the United States & Canada, Local 598 (Intervener) (*Dismissed*)

3075-89-R: Angela Ma (Applicant) v. Canadian Union of Restaurant & Related Employees, Hotel & Restaurant Employees Union, Local 88 (Respondent) v. J. I. Vent Investments Inc. c.o.b. Steak & Burger (Intervener) (*Dismissed*)

0294-90-R: Retail, Wholesale & Department Store Union (Applicant) v. Sudbury News Service Ltd. (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

0940-90-U: Subhash C. Sharma (Complainant) v. Spar Aerospace Ltd. (Respondent) (*Dismissed*)

1027-90-U: Labourers' International Union of North America, Local 183 (Complainant) v. Operative Plasterers & Cement Masons International Association of the United States and Canada, Local 598 and Toronto Structural Concrete Services Ltd. (Respondents) (*Dismissed*)

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*Ontario Labour Relations Board,
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Annual Consolidated Index 1990



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**A Monthly Series of Decisions from the
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**EDITORS: COLLEEN EDWARDS
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Selected decisions of particular reference value are
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GILMAR ELECTRIC INC.; RE I.B.E.W., LOCAL 1739; RE GROUP OF EMPLOYEES	(Jan.)	20
Certification - Certification Where Act Contravened - Charter of Rights and Freedoms - Trade Union Status - Union constitution denying office to any person associated with or supporting certain subversive organizations - Employer arguing provision contravenes <i>Charter</i> and should lead Board to deny union status - Provision not applied in Canada - Focus of inquiry is whether prohibited discrimination exists in practice and not merely whether an allegedly discriminating provision is present in union constitution - Board finding trade union status - Certificate issuing		
QUETICO CENTRE; RE HOSPITALITY, COMMERCIAL AND SERVICE EMPLOYEES UNION, LOCAL 73 OF H.E.R.E.	(Nov.)	1149
Certification - Certification Where Act Contravened - Discharge - Discharge for Union Activities - Interference in Trade Unions - Unfair Labour Practice - Union supporters discharged during organizing campaign - Union having sufficient membership support for representation vote - Discharges likely to have had chilling effect - Vote not likely to show true wishes - Certificate issuing - Reinstatement, compensation, and posting orders made		
REPLA LIMITED; RE C.J.A.	(Dec.)	1319
Certification - Certification Where Act Contravened - Fraud - Reconsideration - Employer		

requesting reconsideration of certification on grounds union failed to inform Board of material change in circumstances relevant to exercise of Board's discretion - Local union executive approved merger with other locals while certification application before Board - Members not notified or attending merger meeting - Union treating members as "members awaiting contract coverage" without full rights of active members, including right to vote on merger resolution - Employer alleging union's failure to inform Board of circumstances surrounding merger resolution constituting misrepresentation and fraud - Majority rejecting employer allegations - Information not material change or relevant to exercise of Board's discretion - Local union continuing in existence - Union members within statutory definition of term - Application dismissed

KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 206; RE GROUP OF EMPLOYEES.....(Feb.)

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Certification - Certification Where Act Contravened - Interference in Trade Unions - Intimidation and Coercion - Unfair Labour Practice - Employer implementing planned layoff two days early after learning about organizing campaign - Employees would reasonably perceive events as connected - Union filing cards for about thirty percent of bargaining unit - No reason to discount union support among laid off employees - Employees on temporary layoff having ongoing interest or connection with workplace - Certificate issuing

ROMATT CUSTOM WOODWORK INC.; RE C.J.A., LOCAL 27(Aug.)

894

Certification - Charter of Rights and Freedoms - Constitutional Law - Practice and Procedure - Certification applications by USWA and CGA to represent guards - Section 12 of Act precluding Board from certifying USWA because it admits to membership persons other than guards and from certifying CGA because it is affiliated with the USWA - Whether a portion of s.12 is inconsistent with the "freedom of association" guaranteed by s.2(d) of the Charter - Respondents bringing non-suit motion after applicants and interveners had concluded calling evidence on s.2(d) - Non-suit motion succeeding - Obtaining of bargaining rights through certification not included within the ambit of freedom of association under s.2(d) of the Charter - Certification is a statutory creation not available to an individual employee - Group rights that have no individual counterpart or no express constitutional protection not coming within the ambit of s.2(d) - No constitutional right under s.2(d) to certification free of the constraints imposed by s.12 of the Act - Certification applications dismissed

PINKERTON'S OF CANADA LTD.; RE C.G.A; RE RICHARD BIBEAULT; RE INCO LIMITED; RE ATTORNEY-GENERAL OF ONTARIO; RE NATIONAL PROTECTIVE SERVICES COMPANY LIMITED; RE GEORGE FAULKENBURG; RE BOARD OF MANAGEMENT FOR THE METROPOLITAN TORONTO ZOO; RE INTERNATIONAL UNION UNITED PLANT GUARDS, LOCAL 1962; RE RON SAXTON; RE BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE GORDON A. SOUTHORN; RE WACKENHUT OF CANADA LIMITED; RE SHANE FREEMAN; RE U.S.W.A.; RE LARRY BISHOP(June)

673

Certification - Charter of Rights and Freedoms - Evidence - Natural Justice - Practice and Procedure - Witness - Employee sidesperson while former MPP had objected in Legislature to provision of Act - Constitutionality of provision challenged in current proceedings - Employer alleging reasonable apprehension of bias - Board rejecting allegation - Board members appointed because of labour relations experience - Remarks made in different context nineteen years ago - Union seeking to call expert witness on content of freedom of association in European countries - Evidence analogous to legal argument about proper scope of freedom of association - Evidence not admissible in determining content of *Charter*

freedom - Evidence admissible in determining whether provision reasonable limit to <i>Charter</i> freedom	
PINKERTON'S OF CANADA; C.G.A.; RE RICHARD BIBEAULT; RE INCO LIMITED; RE ATTORNEY-GENERAL OF ONTARIO; RE NATIONAL PROTECTIVE SERVICES COMPANY LIMITED; RE GEORGE FAULKENBURG; RE BOARD OF MANAGEMENT FOR THE METROPOLITAN TORONTO ZOO; RE INTERNATIONAL UNION UNITED PLANT GUARDS, LOCAL 1962; RE RON SAXTON; RE BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE GORDON A. SOUTHORN; RE WACKENHUT OF CANADA LIMITED; RE SHANE FREEMAN; RE U.S.W.A.; RE LARRY BISHOP	(Jan.) 68
Certification - Construction Industry - Employee - Individual allegedly "just happened to show up" at worksite to retrieve a belt and did some unpaid labour - Individual doing bargaining unit work on application date and thus was employee for purposes of certification application - Certificate issuing	
MED SIDING; RE C.A.W., LOCAL 27; RE GROUP OF EMPLOYEES	(Oct.) 1072
Certification - Construction Industry - Employer engaged in drilling to obtain rock and soil samples for engineering firms - Engineering firms using samples to determine appropriateness of area for future construction - Time lag of up to 10 years between drilling and commencement of actual construction work - Employer not engaged in construction industry	
ATCOST SOIL DRILLING INC.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES	(Jan.) 1
Certification - Construction Industry - Employer engaged primarily in cleaning and maintenance, but having four employees hired to paint university student residence - Primary purpose of painting was decoration rather than maintenance - Employer engaged in construction industry - Certificate issuing	
COURTESY MAINTENANCE, COURTESY GROUP INC. C.O.B.; RE P.A.T., LOCAL 1824.....	(Nov.) 1124
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SPENCER J. HAWKES INC.; RE IRONWORKERS DISTRICT COUNCIL OF ONTARIO	(Sept.) 966
Certification - Construction Industry - Intimidation and Coercion - Membership Evidence - Unfair Labour Practice - Employer alleging that union's membership evidence was obtained in violation of Act - Union representative making statements to employees that if they did not sign union cards they would be removed from work site - Board finding that union was only attempting to enforce its collective agreement with the general contractor - No improper conduct - Certificates issuing	
CUNEOP INTERIORS; RE C.J.A., LOCAL 27.....	(May) 499
Certification - Construction Industry - Natural Justice - Practice and Procedure - Reconsideration - Terminal Date - Employer requesting reconsideration of certifications on grounds employees failed to receive notice - Employer pleading own failure either to post Notice of Application or to file Return of Posting Card - Union filed Advice of Posting Card but did not fill in necessary information - Union filing Card after terminal date - Not unreasonable to expect union to act with promptness and diligence in checking posting where union asking Board to exercise discretion to certify without a hearing - Board directing matter to be listed for hearing representations on notice issues	
VISSERS NURSERY; RE L.I.U.N.A., LOCAL 183	(Sept.) 989

Certification - Construction Industry - Petition - Reconsideration - Union leading evidence showing sole petitioner had lied during evidence at certification application - Credibility critical in one-person petition - Union satisfying criteria of new evidence and due diligence - Certificate issuing

INZOLA CONSTRUCTION (1976) LIMITED; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GROUP OF EMPLOYEES(Jan.)

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Certification - Construction Industry - Practice and Procedure - Certification application mailed to Board by registered mail on a Sunday deemed to have been filed on that date - Employer requesting Board to depart from its usual practice in construction industry of determining membership support as of application date - Board explaining its rationale for different practices in the construction industry - Board not departing from its usual practice in this case

AL GORDON ELECTRIC LIMITED; RE I.B.E.W., LOCAL 120; RE GROUP OF EMPLOYEES(June)

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Certification - Construction Industry - Practice and Procedure - Parties agreeing to removal of two names from "Schedule A" employee list - Employer later asserting these individuals should be included for purposes of count - Board not permitting parties to resile from agreement

BEAVERBROOK ESTATES INC.; RE L.I.U.N.A., LOCAL 183(Jan.)

13

Certification - Construction Industry - Practice and Procedure - Union making sixth certification application for substantially the same group of employees in two months - Respondent employer requesting that application be dismissed and bar imposed - Board disagreeing with argument that the mere frequency of applications warrants dismissal and a bar - Repeated applications may be vexatious or an abuse of process but these concerns not raised here - Motion dismissed - Certification application to proceed

D.J. VENASSE CONSTRUCTION LIMITED; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL(Apr.)

419

Certification - Employee - Practice and Procedure - Employee who verified time sheets and signed discharge letters not managerial - Employee not making final decisions - Board having no obligation under *Statutory Powers Procedure Act* to give written reasons for evidentiary ruling - Statutory obligation relating to final, not interim, decisions

ZAIDAN REALTY CORPORATION; RE U.P.G.W.A., LOCAL 1962(Dec.)

1357

Certification - Employer Support - Petition - Unfair Labour Practice - Whether employer providing union with names and addresses of employees during organizing campaign prohibiting certification of union - Provision of this information not constituting "support" within the meaning of s.13 - Meeting of employees called by employer factor to consider in looking at voluntariness of petition - No violation of Act when lead hands circulating petition expressed personal views on the consequences of unionization - Failure of one of two originators/circulators of petition to testify another factor to consider - Petition not voluntary - Certificate issuing

CONTINUOUS MINING SYSTEMS LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES(Apr.)

404

Certification - Evidence - Fraud - Petition - Practice and Procedure - Reconsideration - Employee seeking reconsideration of Board's decision certifying union on basis that application tainted by fraud - Assertion that another employee circulated a petition but never intended to file it with the Board - Further allegation that this employee was acting as an agent for the union with respect to his petition activity - Union making non-suit application and electing to call no evidence - Reconsideration application dismissed - Circulator of the petition

was not an agent or an officer of the union - No evidence as to why petition was not filed - Evidence consistent with theory that employees change their minds concerning support for a union - Objecting employees bound by the actions of their representative after selecting person to represent their interests in opposing the union	
RUSSELL H. STEWART CONSTRUCTION COMPANY LIMITED; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES.....	464
Certification - Evidence - Membership Evidence - Board discretion to order certification vote or automatic certification here depending on validity of a single card - Card showing inconsistent statements as to whether \$1.00 paid - Board not permitting union to lead <i>viva voce</i> evidence as to whether \$1.00 paid - Payment of \$1.00 in doubt on face of card - Card not to be counted - Vote directed	
599207 ONTARIO INC.; RE H.E.R.E., LOCAL 604, A.F. OF L., C.I.O., C.L.C.; RE GROUP OF EMPLOYEES	1103
Certification - Evidence - Membership Evidence - Membership evidence challenged on basis of unspecified allegations - Board does not conduct examinations where no specific or explicit allegations of non-pay or non-sign	
MISSISSAUGA HOSPITAL, THE; RE C.U.P.E.; RE C.U.O.E., LOCAL 101(Dec.)	1304
Certification - Evidence - Membership Evidence - Practice and Procedure - Trade union membership evidence lost in mail en route to Board - Union filing photocopies with Form 9 Declaration attesting to rigorous review and confirmation of validity of membership evidence - Board accepting photocopies as meeting requirements of Rules of Procedure - Photocopies backed by Declaration constituting "best evidence" under circumstances - Interim certificate issuing	
HOLT-MCDERMOTT MINE, AMERICAN BARRICK RESOURCES CORPORATION CARRYING ON BUSINESS AS; RE U.S.W.A.; RE GROUP OF EMPLOYEES.....	267
Certification - Evidence - Membership Evidence - Practice and Procedures - Union business agent unable to recall whether he had reviewed information on Form 9 Declaration before signing and filing - Form 9 improper and unreliable under circumstances - Application dismissed	
599207 ONTARIO INC.; RE H.E.R.E., LOCAL 604, A.F. OF L., C.I.O., C.L.C. .(Dec.)	1205
Certification - Evidence - Trade Union - Trade Union Status - Board not satisfied that applicant organization had complied with International By-Laws in establishing Local Constitution - Applicant failing to file current International Constitution - Board unable to conclude whether applicant governed by Local or International Constitution - Board unable to conclude that applicant was "trade union" - Applicant filing photocopies of membership evidence - Photocopies not normally acceptable as membership evidence for certification in absence of satisfactory reasons why originals not available - Application dismissed	
OPERA GHOST PRODUCTIONS INC.; RE I.A.T.S.E., THEATRICAL WARDROBE UNION, LOCAL 822	325
Certification - Fraud - Practice and Procedure - Reconsideration - Allegation that employee who circulated petition was union agent with no intention to file petition or appear before Board - Allegation, if true, may constitute fraud and abuse of Board's process - Matter set down for hearing	
RUSSELL H. STEWART CONSTRUCTION COMPANY LIMITED; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES.....	79
Certification - Intimidation and Coercion - Membership Evidence - Employer arguing that union "bought" memberships by providing valuable merchandise to employees who signed mem-	

bership cards and paid \$1.00 - Employer arguing that vote required to remove "cloud" or that all cards should be disregarded - Board determining that such allegations must be made in a timely and particularized manner - Giving out of merchandise not condition of signing a card - Union's conduct did not cross line from salesmanship to buying of memberships - Certificate issuing	JOHNSON CONTROLS LTD.; RE C.A.W.; RE GROUP OF EMPLOYEES	(June)	651
Certification - Intimidation and Coercion - Representation Vote - Unfair Labour Practice - Intimidatory statements made by one employee to another during an organizing campaign - Statements not made by a collector or on behalf of the union - Peer pressure during organizing drive not relevant to reliability of membership evidence - Board will not order a representation vote where a statement about union dues is made by a rank and file employee - Certificate issuing	NATIONAL NEWS COMPANY LIMITED; RE TEAMSTERS UNION, LOCAL 91; RE GROUP OF EMPLOYEES	(Aug.)	870
Certification - Membership Evidence - Practice and Procedure - Timeliness - Employer and petitioners arguing that union not entitled to certification because of employer support and alleging that the union had discriminated against one petitioner by not giving him an opportunity to join the union - Allegations not entertained by Board because they were not made in a timely manner as required by Rule 72 - Further allegations of defective membership evidence - Board usually treating non-sign/non-pay allegations with greater latitude on question of timeliness but Rule 72 still applicable - Membership cards alleged to be defective must be identified - Board direction to that effect not complied with - Allegations not entertained - Board also denying access to membership evidence for the purpose of having the employer's handwriting analyst review it - Parties agreeing certification application should be dismissed	ROYTEC VINYL CO., 732571 ONTARIO LTD. AND 732570 ONTARIO INC. C.O.B. IN PARTNERSHIP AS; RE LAUNDRY & LINEN DRIVERS AND INDUSTRIAL WORKERS UNION, LOCAL 847, AFFILIATED WITH THE TEAMSTERS' UNION; RE GROUP OF EMPLOYEES	(June)	727
Certification - Natural Justice - Practice and Procedure - Board failing to respond to petitioner request for local hearing - Petitioners not attending scheduled hearing in Toronto - Board declining to schedule additional hearing to consider statements of desire - Board posting in workplace gave notice of time and place of scheduled hearing and consequences of failure to appear - Consequences also set out in Board Rules of Procedure - Petitioners not entitled to assume request for change of venue would be granted - Interim certificate issuing	HOLT-MCDERMOTT MINE, AMERICAN BARRICK RESOURCES CORPORATION CARRYING ON BUSINESS AS; RE U.S.W.A.; RE GROUP OF EMPLOYEES	(Mar.)	267
Certification - Natural Justice - Practice and Procedure - Reconsideration - Employer alleging it did not receive timely notice of certification application - Employer disputing facts relating to notice and posting on which decision based - Board directing listing for hearing on matters raised	P.H. ATLANTIC PLUMBING & HEATING DIVISION OF 629629 ONTARIO LIMITED; RE U.A., LOCAL 463.....	(Dec.)	1313
Certification - Natural Justice - Practice and Procedure - Reconsideration - Employer arguing it received no notice of hearing - Employer failing to rebut statutory presumption that notice sent by mail was received - Application for reconsideration dismissed	COSNAUT STEEL INC.; RE B.S.O.I.W., LOCAL 721	(Dec.)	1257

Certification - Natural Justice - Practice and Procedure - Regular posting at employer's head office inadequate to give notice to all affected employees - Board directing employer to provide Board with employee address list for notice by mail	WACKENHUT OF CANADA LTD.; RE U.S.W.A.....(Mar.)	357
Certification - Natural Justice - Practice and Procedure - Representation Vote - Employer failing to post Form 70 with Officer's Report until terminal date - Board directing employer to post decision of Board notifying employees of right to make representation on vote or report - Certificate to issue if no representations received within fifteen days	SAINT LUKE'S PLACE; RE S.E.I.U., LOCAL 204 AFFILIATED WITH S.E.I.U., A.F. OFL., C.I.O., C.L.C.....(Dec.)	1333
Certification - Natural Justice - Practice and Procedure - Trade Union - Union filing membership evidence - Union name on cards different from name under which application brought - Board will not treat application for membership as membership in another union unless former is local of latter - Board satisfied application intended to be brought by union named on membership cards - Board permitting amendment to union name on application - Board extending terminal date and directing new posting of Form 6 Notice of Application at workplace	GOODY CANADA LIMITED; RE A.C.T.W.U.(Feb.)	159
Certification - Natural Justice - Representation Vote - Employer unable to post Notice to Employees of vote result until day before time fixed for objections - Board ordering posting of decision extending time of objection	CARLTON ROMAN CATHOLIC SEPARATE SCHOOL BOARD; RE C.U.P.E.; RE GROUP OF EMPLOYEES	(Jan.) 19
Certification - Petition - Employees reasonably believing petitioners were meeting with owner - Employees believing owner had threatened plant closure if union organizing successful - Statements by petitioners leading employees to believe unionization would result in loss of benefits - Board unable to accept petition as voluntary expression of employee wishes - Certificate issuing	BLUE BELL CANADA INCORPORATED; RE U.S.W.A.; RE GROUP OF EMPLOYEES	(Feb.) 121
Certification - Petition - Individual originating and circulating petition was conduit to, and identified with, management - Board not satisfied of voluntariness of petition	RACAL-CHUBB CANADA INC.; RE C.J.A., LOCAL 27; RE GROUP OF EMPLOYEES	(Sept.) 944
Certification - Petition - Practice and Procedure - Board reviewing law with respect to petitions - Objecting employees failing to demonstrate voluntariness of petition - Certificate issuing	WESTLAKE ELECTRICAL CONTRACTORS LIMITED; RE I.B.E.W., LOCAL 353; RE GROUP OF EMPLOYEES	(Nov.) 1163
Certification - Petition - Practice and Procedure - Termination - Applicant employee was petitioner in earlier certification proceeding - Whether Board discretion "to bar an unsuccessful applicant for any period from the date of the dismissal of the unsuccessful application" applies to unsuccessful petitioner bringing termination application - Act requiring Board to		

entertain timely termination application - Certification not prior "unsuccessful application"	
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INZOLA CONSTRUCTION (1976) LIMITED; RE CALOGERO MATTINA; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL ON BEHALF OF ITS AFFILIATED LOCAL UNIONS 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081 AND 1089.....	(Dec.) 1293
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SAXON ATHLETIC MANUFACTURING INC.; RE IWA - CANADA; RE GROUP OF EMPLOYEES.....	(May) 618
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VENTRA GROUP INC.; RE C.A.W.; RE GROUP OF EMPLOYEES	(Aug.) 903
Certification - Practice and Procedure - Trade Union - Six month bar imposed against local of union following unsuccessful representation vote - Parent union of local filing certification application 4 weeks later - Whether bar applies to parent union - Whether Board should exercise its discretion to decline to hear application - Application to be processed - Parent union a separate legal entity - Bar not applicable - No compelling reason to decline to entertain application	
REPLA LIMITED; RE C.J.A.....	(May) 612
Certification - Practice and Procedure - Trade Union - Trade Union Status - No finding of status at the time application was filed, but its status was recognized by the Board in another unrelated proceeding, before the hearing date in this application - Union not obliged to prove status - Outstanding status issue no bar to meeting with Labour Relations Officer - Certificate issuing	
SHORELINE MOTOR HOTEL, RONSCOTT INC. C.O.B. AS; RE HOSPITALITY, COMMERCIAL AND SERVICE EMPLOYEES UNION, LOCAL 73 OF H.E.R.E.....	(Dec.) 1334
Certification - Trade Union Status - Applicant citing recognition as employee organization by Ontario Public Service Labour Relations Tribunal - Trade union status question of fact in each case - Board having regard for applicant's history as bargaining agent for Crown employees - Applicant fitting statutory definition	
VAUGHAN, THE CORPORATION OF THE TOWN OF, AND TOKMAKJIAN LIMITED; RE A.T.U., LOCAL 1587; RE GROUP OF EMPLOYEES.....	(Jan.) 102
Certification - Trade Union Status - Officer of applicant testifying as to steps taken by employees to form trade union - Draft constitution reviewed, amended, and adopted - Terms of constitution sufficiently comprehensive to allow Board to conclude applicant was viable organization formed for purposes of representing employees in their labour relations - Applicant falling within statutory definition of trade union	
STANDARD INDUSTRIAL TECHNOLOGIES INC.; RE UNITED EMPLOYEES OF STANDARD INDUSTRIAL TECHNOLOGIES INC.	(Feb.) 220
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every distinction between groups constitutes discrimination - Provisions longstanding and accepted in industry - Provision not such as to prevent certification or cause collective agreement to be deemed not collective agreement - Board denying intervenor status to Human Rights Commission - Certificate issuing		
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REPLA LIMITED; RE C.J.A.	(Dec.)	1319
Certification Where Act Contravened - Certification - Fraud - Reconsideration - Employer requesting reconsideration of certification on grounds union failed to inform Board of material change in circumstances relevant to exercise of Board's discretion - Local union executive approved merger with other locals while certification application before Board - Members not notified or attending merger meeting - Union treating members as "members awaiting contract coverage" without full rights of active members, including right to vote on merger resolution - Employer alleging union's failure to inform Board of circumstances surrounding merger resolution constituting misrepresentation and fraud - Majority rejecting employer allegations - Information not material change or relevant to exercise of Board's discretion - Local union continuing in existence - Union members within statutory definition of term - Application dismissed		
KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 206; RE GROUP OF EMPLOYEES	(Feb.)	169
Certification Where Act Contravened - Certification - Interference in Trade Unions - Intimidation and Coercion - Unfair Labour Practice - Employer implementing planned layoff two days early after learning about organizing campaign - Employees would reasonably perceive events as connected - Union filing cards for about thirty percent of bargaining unit - No reason to discount union support among laid off employees - Employees on temporary layoff having ongoing interest or connection with workplace - Certificate issuing		
ROMATT CUSTOM WOODWORK INC.; RE C.J.A., LOCAL 27	(Aug.)	894
Certification Where Act Contravened - Charter of Rights and Freedoms - Judicial Review - Unfair Labour Practice - Layoff and intimidation of employees, and granting of wage increases constituting unfair labour practices - Letter to employees from president of company proper exercise of employer free speech - Reverse onus not contrary to Charter - Petition rejected - First contract legislation not altering section 8 jurisprudence - Certificate issuing - Unnecessary for union to call every grievor as a witness - All laid-off employees		

reinstated with compensation - Application for leave to appeal to the Court of Appeal dismissed	
BAYDAK, DONNA ON BEHALF OF A GROUP OF 156 EMPLOYEES; RE O.L.R.B. AND U.F.C.W., LOCAL 206 AND KNOB HILL FARMS LIMITED	(Oct.)
Certification Where Act Contravened - Discharge - Interference in Trade Unions - Unfair Labour Practice - Employer making layoff prediction in bulletin to employees - Bulletin distributed during union organizing campaign - Key union organizer terminated - Refusal to hire person who might have become a union supporter - Termination found to be a breach of the Act - Union certified without vote pursuant to s.8	
DAVID CHAPMAN'S ICECREAM LIMITED; RE U.F.C.W., LOCAL 175	(July)
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NEPEAN BUS LINES INC.; RE TEAMSTERS' UNION, LOCAL 91; RE DAVE LONEY	(Mar.)
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HY'S STEAK HOUSE, HYDON HOLDINGS LTD. C.O.B. AS; RE R.W.D.S.U., AFL-CIO-CLC	(Feb.)
Charter of Rights - Construction Industry - Judicial Review - Union Successor Status - Two locals of same union merged - Officers and members of one local opposed - Employer given status to intervene but not permitted to lead evidence on the consequences of the merger on its business operations - Merger in compliance with union constitution - Constitution not requiring membership approval - Divisional Court upholding Board decision - Failure to hold vote no infringement of Charter freedom of association - Board operated within limits of statutory discretion in making successor declaration	
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Charter of Rights and Freedoms - Certification - Certification Where Act Contravened - Collective Agreement - Collective agreement having terms favourable to older workers - Employer arguing agreement discriminates on basis of age contrary to <i>Human Rights Code</i> and <i>Charter of Rights and Freedoms</i> - Board finding no discriminatory intent or effect - Not every distinction between groups constitutes discrimination - Provisions longstanding and accepted in industry - Provision not such as to prevent certification or cause collective agreement to be deemed not collective agreement - Board denying intervenor status to Human Rights Commission - Certificate issuing	
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ing certain subversive organizations -Employer arguing provision contravenes *Charter* and should lead Board to deny union status - Provision not applied in Canada - Focus of inquiry is whether prohibited discrimination exists in practice and not merely whether an allegedly discriminating provision is present in union constitution - Board finding trade union status - Certificate issuing

QUETICO CENTRE; RE HOSPITALITY, COMMERCIAL AND SERVICE EMPLOYEES UNION, LOCAL 73 OF H.E.R.E.(Nov.)

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Charter of Rights and Freedoms - Certification - Constitutional Law - Practice and Procedure - Certification applications by USWA and CGA to represent guards - Section 12 of Act precluding Board from certifying USWA because it admits to membership persons other than guards and from certifying CGA because it is affiliated with the USWA - Whether a portion of s.12 is inconsistent with the "freedom of association" guaranteed by s.2(d) of the Charter - Respondents bringing non-suit motion after applicants and interveners had concluded calling evidence on s.2(d) - Non-suit motion succeeding - Obtaining of bargaining rights through certification not included within the ambit of freedom of association under s.2(d) of the Charter -Certification is a statutory creation not available to an individual employee - Group rights that have no individual counterpart or no express constitutional protection not coming within the ambit of s.2(d) - No constitutional right under s.2(d) to certification free of the constraints imposed by s.12 of the Act - Certification applications dismissed

PINKERTON'S OF CANADA LTD.; RE C.G.A; RE RICHARD BIBEAULT; RE INCO LIMITED; RE ATTORNEY-GENERAL OF ONTARIO; RE NATIONAL PROTECTIVE SERVICES COMPANY LIMITED; RE GEORGE FAULKENBURG; RE BOARD OF MANAGEMENT FOR THE METROPOLITAN TORONTO ZOO; RE INTERNATIONAL UNION UNITED PLANT GUARDS, LOCAL 1962; RE RON SAXTON; RE BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE GORDON A. SOUTHORN; RE WACKENHUT OF CANADA LIMITED; RE SHANE FREEMAN; RE U.S.W.A.; RE LARRY BISHOP(June)

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Charter of Rights and Freedoms - Certification - Evidence - Natural Justice - Practice and Procedure - Witness - Employee sidesperson while former MPP had objected in Legislature to provision of Act - Constitutionality of provision challenged in current proceedings - Employer alleging reasonable apprehension of bias - Board rejecting allegation - Board members appointed because of labour relations experience - Remarks made in different context nineteen years ago - Union seeking to call expert witness on content of freedom of association in European countries - Evidence analogous to legal argument about proper scope of freedom of association - Evidence not admissible in determining content of *Charter* freedom - Evidence admissible in determining whether provision reasonable limit to *Charter* freedom

PINKERTON'S OF CANADA; C.G.A.; RE RICHARD BIBEAULT; RE INCO LIMITED; RE ATTORNEY-GENERAL OF ONTARIO; RE NATIONAL PROTECTIVE SERVICES COMPANY LIMITED; RE GEORGE FAULKENBURG; RE BOARD OF MANAGEMENT FOR THE METROPOLITAN TORONTO ZOO; RE INTERNATIONAL UNION UNITED PLANT GUARDS, LOCAL 1962; RE RON SAXTON; RE BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE GORDON A. SOUTHORN; RE WACKENHUT OF CANADA LIMITED; RE SHANE FREEMAN; RE U.S.W.A.; RE LARRY BISHOP(Jan.)

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Charter of Rights and Freedoms - Certification Where Act Contravened - Judicial Review - Unfair Labour Practice - Layoff and intimidation of employees, and granting of wage increases constituting unfair labour practices - Letter to employees from president of company proper exercise of employer free speech - Reverse onus not contrary to Charter - Petition rejected - First contract legislation not altering section 8 jurisprudence - Certificate issuing - Unnecessary for union to call every grievor as a witness - All laid-off employees

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BAYDAK, DONNA ON BEHALF OF A GROUP OF 156 EMPLOYEES; RE O.L.R.B. AND U.F.C.W., LOCAL 206 AND KNOB HILL FARMS LIMITED	(Oct.)
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KOHUT, JOHN; RE C.A.W., AND ITS LOCAL 303; RE GENERAL MOTORS OF CANADA LIMITED	(Oct.)
Collective Agreement - Accreditation - Construction Industry - Construction Industry Grievance - Employer signing supplementary document to collective agreement between union and contractors association - Employer not member of association and signing subsequent to main parties - Employer not signing later agreement which extended terms of first agreement - Employer bound by bargaining relationship and accreditation provisions	1052
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Collective Agreement - Adjournment - First Contract Arbitration - Interest Arbitration - Judicial Review - Practice and Procedure - Stay - Employer and termination applicant requesting that Board adjourn its hearings to arbitrate the settlement of a first collective agreement pending a stay and judicial review application in the courts - Adjournment denied - Board proceeding with hearings in absence of employer - Board amending significant number of articles in union's proposed collective agreement to reflect what should reasonably be contained in a first collective agreement - Board deleting paid education leave, COLA and pension plan provisions	83
VENTURE INDUSTRIES CANADA, LTD.; RE C.A.W.	(July)
Collective Agreement - Bargaining Unit - Duty to Bargain in Good Faith - Final Offer Vote - Strike - Unfair Labour Practice - Voter eligibility in final offer vote limited under circumstances to persons who were employees in bargaining unit at time strike began, except where connection to workplace severed prior to date of vote - Injured employee with no expectation of returning to bargaining unit not eligible to vote - Good faith bargaining obligation not requiring employer to discuss new information with trade union prior to requesting or participating in final offer vote - Board refraining from exercising discretion to grant unlawful strike declaration or direction - Trade union refusal to execute collective agreement constituting under circumstances breach of duty to bargain in good faith - Board directing union to bargain in good faith, submit to vote results, and execute collective agreement reflecting final offer accepted in vote	809
MCINTYRE, WILF, FRED MIRON, ROLAND FRAYNE, NIELS HUSMAN, LARRY DUHAIME AND I.W.A. - CANADA, LOCAL 2693; RE PROSPER BRIZZARD, RICHARD BRIZZARD, ROBERT CASSON, RICHARD KOSKI, DAVID JAG- GARD, MANFRED KRAUSE, ROBERT KRAUSE, DAVID ROSS, AULIUS TIITTO, DARRELL WESTOVER, RAYNARD JACOBSON, BRUCE NORDSTROM AND LARRY JAGGARD; RE GRAVEL AND LAKE SERVICES LIMITED	(Oct.)
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ROBERT LAFRAMBOISE MECHANICAL LIMITED; RE S.M.W., LOCAL 47.....	947 (Sept.)
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PIGOTT CONSTRUCTION LIMITED AND C.J.A., LOCAL 27; RE U.A., LOCAL 46 AND I.B.E.W., LOCAL 353; RE L.I.U.N.A., LOCAL 506	441 (Apr.)
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STELCO FASTENER & FORGING CO., STELCO INC.; RE U.S.W.A., LOCAL 3767 AND 3749; RE FRED J. ZICARD	339 (Mar.)
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HILLVIEW FARMS LIMITED; RE U.F.C.W., LOCAL 1000A	564 (May)
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signed at last negotiating session - Votes conducted by union not ratification votes - No collective agreement based on principles of contract law - Board finding no collective agreement in place - Applications for directions concerning illegal strikes dismissed	
PHOTO ENGRAVERS & ELECTROTYPEERS LIMITED, COUNCIL OF PRINTING INDUSTRIES OF CANADA ON BEHALF OF; RE G.C.I.U., LOCAL 500M (ROTO GRAVURE) AND THOSE PERSONS LISTED IN SCHEDULE "1" TO THE APPLICATION.....	430
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RIDGEWOOD INDUSTRIES; RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE PROFESSIONAL AND TECHNICAL EMPLOYEES INTERNATIONAL UNION, LOCAL 351; RE U.S.W.A. AND OBJECTING EMPLOYEES.....	331
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ONTARIO HYDRO; RE THE SOCIETY OF ONTARIO HYDRO PROFESSIONAL AND ADMINISTRATIVE EMPLOYEES; RE THE COALITION TO STOP THE CERTIFICATION OF THE SOCIETY, ON BEHALF OF CERTAIN EMPLOYEES...	305
Collective Agreement - Union Security - Union alleging that employer failed to remit to it dues that had been deducted from employees' pay pursuant to a collective agreement - Matter had originally been settled at arbitration on agreement of the parties that the dispute would be submitted as a complaint to the Board - Board dismissing complaint for lack of jurisdiction - Matter is one for a grievance arbitration board - Board's jurisdiction cannot be expanded by the parties' agreement	
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ALGONQUIN COLLEGE OF APPLIED ARTS AND TECHNOLOGY, THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF NATURAL RESOURCES AND THE BOARD OF GOVERNORS OF; RE O.P.S.E.U.	644
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- Colleges Collective Bargaining Act - Duty of Fair Representation - Unfair Labour Practice - Complainants alleging right under collective agreement and union constitution to arbitration of grievances and to representation by own chosen representative, whether or not union steward - Complainants alleging union breached duty of fair representation by settling workload grievance without grievor consent, by agreeing to consent arbitration award, and by amending collective agreement - Collective agreement not a contract between union and members enforceable through duty of fair representation - Union constitution not enforceable through duty of fair representation, but relevant to determination of whether union conduct arbitrary, discriminatory or in bad faith - Board finding no breach of duty
- WILSON, ANNA; RE O.P.S.E.U., LOCAL 110; RE FANSHawe COLLEGE AND THE ONTARIO COUNCIL OF REGENTS FOR COLLEGES OF APPLIED ARTS AND TECHNOLOGY 1167 (Nov.)
- Conciliation - Hospital Labour Disputes Arbitration Act - Reference - Sale of a Business - Board of arbitration constituted - Business sold - New employer requesting Minister to appoint a conciliation officer - Whether Minister can appoint a conciliation officer even though an arbitration board has been established under HLDAA - Sale of a business provision does not preserve all the rights of a union as they stood at the time of sale - Board advising Minister that he is required to appoint a conciliation officer
- TRILLIUM MANOR HOME FOR THE AGED, CORPORATION OF THE COUNTY OF SIMCOE; RE O.N.A..... 472 (Apr.)
- Constitutional Law - Certification - Charter of Rights and Freedoms - Practice and Procedure - Certification applications by USWA and CGA to represent guards - Section 12 of Act precluding Board from certifying USWA because it admits to membership persons other than guards and from certifying CGA because it is affiliated with the USWA - Whether a portion of s.12 is inconsistent with the "freedom of association" guaranteed by s.2(d) of the Charter - Respondents bringing non-suit motion after applicants and interveners had concluded calling evidence on s.2(d) - Non-suit motion succeeding - Obtaining of bargaining rights through certification not included within the ambit of freedom of association under s.2(d) of the Charter - Certification is a statutory creation not available to an individual employee - Group rights that have no individual counterpart or no express constitutional protection not coming within the ambit of s.2(d) - No constitutional right under s.2(d) to certification free of the constraints imposed by s.12 of the Act - Certification applications dismissed
- PINKERTON'S OF CANADA LTD.; RE C.G.A; RE RICHARD BIBEAUT; RE INCO LIMITED; RE ATTORNEY-GENERAL OF ONTARIO; RE NATIONAL PROTECTIVE SERVICES COMPANY LIMITED; RE GEORGE FAULKENBURG; RE BOARD OF MANAGEMENT FOR THE METROPOLITAN TORONTO ZOO; RE INTERNATIONAL UNION UNITED PLANT GUARDS, LOCAL 1962; RE RON SAXTON; RE BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE GORDON A. SOUTHORN; RE WACKENHUT OF CANADA LIMITED; RE SHANE FREEMAN; RE U.S.W.A.; RE LARRY BISHOP 673 (June)
- Constitutional Law - Duty of Fair Representation - Agreed facts indicating employer engaged in interprovincial trucking - Business subject to *Canada Labour Code* and not *Labour Relations Act* - Board having no jurisdiction - Complaint dismissed
- C.T. TRANSPORT, DIVISION OF McKINLAY TRANSPORT LTD.; RE JOHN BRODHAGEN; RE TEAMSTERS, LOCAL UNION 938 128 (Feb.)
- Constitutional Law - Judicial Review - Employer appealing decision of Divisional Court upholding Board's jurisdiction to issue certification order in commercial fishing industry - Federal constitutional jurisdiction over fisheries restricted to protection and preservation of fisheries as public resource - Federal constitutional jurisdiction not extending to business of commercial fishing - Labour relations of commercial fishing falling within provincial jurisdiction

over property and civil rights - Board having jurisdiction to issue certification order - Appeal dismissed

GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION AND ONTARIO LABOUR RELATIONS BOARD; RE 504578 ONTARIO LIMITED, CARRYING ON BUSINESS AS MURRAY COLLARD FISHERIES, JIM FRASER FISHERIES LTD., H. TIESSEN FISHERIES LTD., FAVIGNANA FISHING CO. LIMITED, A. FIGLIOMENI & SONS LIMITED, FOUR BROTHERS FISHING CO., 538391 ONTARIO LIMITED OPERATING AS PERALTA FOODS, CP FISHERIES LTD., FAMILY FISHERY COMPANY LTD.....(Jan.)

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Construction Industry - Abandonment - Bargaining Rights - Construction Industry Grievance - Union certified in 1976 - No Board Report issued in late 1977 - Province-wide ICI bargaining regime imposed six months later in 1978 - Union not interacting with employer in 12 year period between No Board Report and filing of present grievance - Union attempted to organize employees in 1981 - Activity following province-wide bargaining relevant in determining whether abandonment had occurred in prior six month interval - Interval followed only by conduct demonstrating union belief it held no bargaining rights - No minimum period for finding of abandonment - Bargaining rights abandoned - Application dismissed

MARINELAND OF CANADA INC.; RE C.J.A., LOCAL 38; RE GROUP OF EMPLOYEES

(Dec.)

1298

Construction Industry - Accreditation - Collective Agreement - Construction Industry Grievance - Employer signing supplementary document to collective agreement between union and contractors association - Employer not member of association and signing subsequent to main parties - Employer not signing later agreement which extended terms of first agreement - Employer bound by bargaining relationship and accreditation provisions

STEELFABCO INC.; RE S.M.W., LOCAL 562

(Jan.)

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Construction Industry - Adjournment - Construction Industry Grievance - Judicial Review - Natural Justice - Practice and Procedure - Grievance filed by union alleging employer breached collective agreement by not hiring through hiring hall - Employer asking by letter for adjournment - Employer not appearing at hearing - Employer found to have breached collective agreement - Board not granting adjournments unless on consent of parties - Otherwise request must be made before panel on hearing date - Employer's reconsideration request denied - Employer bringing application for judicial review on the ground that the Board failed to comply with the rules of natural justice by proceeding with hearing in employer's absence - Judicial review dismissed by Divisional Court

TODD RAMSAY INTERIORS INC. AND JAMES R. TODD; RE C.J.A., LOCAL 93 AND THE ONTARIO LABOUR RELATIONS BOARD.....(June)

748

Construction Industry - Adjournment - Construction Industry Grievance - Jurisdictional Dispute - Natural Justice - Practice and Procedure - Union alleging employer failed to hold mark-up meeting contrary to collective agreement - Intervener union seeking adjournment to permit disposal of issue as jurisdictional dispute - Union not seeking direction with respect to work assignment, but rather relief from conduct of employer - Union not required to file and be successful in jurisdictional dispute before proceeding with referral of construction industry

grievance - Board proceeding with grievance referral - Board giving all would-be parties opportunity to make representations on notice issue	
ACCO CANADIAN MATERIAL HANDLING, A DIVISION OF BABCOCK INDUSTRIES CANADA INC.; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1592; RE IRONWORKERS DISTRICT COUNCIL OF ONTARIO AND B.S.O.I.W., LOCAL 700; RE THE ASSOCIATION OF MILLWRIGHTING CONTRACTORS OF ONTARIO INC.; RE ALLIED CONVEYORS LIMITED; RE ADAM CLARK LIMITED; RE COMSTOCK CANADA; RE NICHOLLS-RADTKE & ASSOCIATES LTD.; RE STATE CONTRACTORS INCORPORATED	993 (Oct.)
Construction Industry - Adjournment - Construction Industry Grievance - Jurisdictional Dispute - Practice and Procedure - Union alleging employer failed to hold mark-up meeting contrary to collective agreement - Intervener union seeking adjournment to permit disposal of issue as jurisdictional dispute - A grievance which raises an issue of work assignment, even if only at the remedy stage, brings a dispute within the jurisdictional dispute provisions of the Act - Jurisdictional aspect not arising until breach of collective agreement shown - Board reluctant to embark on jurisdictional dispute where unclear applicant union will succeed in grievance, or a useful purpose be served - Board directing scheduling of grievance referral hearing on allegation that agreement breached - If breach established, Board to convene further hearing on entitlement to damages - If then apparent that applicant union's entitlement to damages is consequent on assignment of work, intervener and any other union having fourteen days to file jurisdictional dispute - If jurisdictional dispute filed, Board to defer consideration of that aspect of applicant union's claim for damages pending disposition of jurisdictional dispute	
SCHINDLER ELEVATOR CORPORATION, THE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION AND ONTARIO HYDRO, AND; RE THE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL ON BEHALF OF LAKE ONTARIO DISTRICT COUNCIL OF C.J.A.; RE I.U.E.C., LOCAL 50	1092 (Oct.)
Construction Industry - Adjournment - Construction Industry Grievance - Practice and Procedure - Parties requesting that Board adjourn hearing date - Chronology indicating that on at least three separate occasions the parties had agreed to adjourn hearing dates which had been scheduled either at their specific request or in consultation with them - Parties reminded of institutional concerns of Board - Increased risk that adjournment will not be granted where congenital reason for request not provided to Board - Proceeding adjourned <i>sine die</i>	
W.G. GALLAGHER CONSTRUCTION LIMITED; RE THE ONTARIO COUNCIL OF P.A.T.; RE P.A.T., DISTRICT COUNCIL 46.....	744 (June)
Construction Industry - Arbitration - Construction Industry Grievance - Practice and Procedure - Employer seeking arbitration of claim against individual employees - Union and employees alleging that failure to serve grievance on individual employees meant no delivery on "other party" as required by Act - "Other party" is local union, even where relief sought against individual employee - Board dismissing one of grievances for delay in filing without reasonable explanation	
ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, THE; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL AND L.I.U.N.A. AND WALTER FOUGERE; RE DONALD E. HICKEY AND TEAMSTERS' UNION.....	243 (Mar.)
Construction Industry - Arbitration - Construction Industry Grievance - Practice and Procedure - Union seeking advisory opinion on interpretation of collective agreement - Neither Union nor employer having taken action to assert their respective interpretations in concrete form	

- Grievance premature - Grievance dismissed without prejudice to refile in appropriate circumstances	
I.B.E.W., AND THE INTERNATIONAL BROTHERHOOD CONSTRUCTION COUNCIL OF ONTARIO AND THE I.B.E.W., LOCAL 115; RE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO ON BEHALF OF ALL CONTRACTOR MEMBERS OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF QUINTE/ST. LAWRENCE AND THE ELECTRICAL CONTRACTORS ASSOCIATION OF QUINTE/ST. LAWRENCE	(Mar.)
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Construction Industry - Bargaining Unit - Certification - Employee - Judicial Review - Practice and Procedure - Board using tests in <i>Gilvesy</i> and <i>E & E Seegmiller</i> to determine whether persons should be included in the bargaining unit for purposes of "the count" - Employee included in unit because majority of his working time on date of application spent performing carpentry work - Certificates issuing - Employer bring application for judicial review on the grounds that, <i>inter alia</i> , the Board erred in considering the type of work performed by employees solely on the application date as opposed to a more representative period - Judicial review dismissed by Divisional Court	
GENSPEC CONSTRUCTION INCORPORATED; RE C.J.A., LOCAL 27 AND ONTARIO LABOUR RELATIONS BOARD	(Apr.)
	486
Construction Industry - Bargaining Unit - Certification - Labourers Union seeking to represent employees engaged in cement finishing and waterproofing - Labourers Union already holding bargaining rights with respect to construction labourers in the ICI sector who are not performing the work of cement finishers or cement masons - Appropriate unit consisting of all construction labourers except employees for whom bargaining rights were already held by the applicant - Clarity note indicating that unit including employees engaged in cement finishing and waterproofing	
DOUG CHALMERS CONSTRUCTION LIMITED; RE L.I.U.N.A., LOCAL 1089; RE O.P.C.M.; RE O.P.C.M., LOCAL 598; RE THE PROVINCIAL CONFERENCE OF ONTARIO OF THE O.P.C.M.....	(July)
	788
Construction Industry - Bargaining Unit - Certification - Practice and Procedure - Application for certification relating to "white area" - Board following its usual practice of describing the unit in reference to the township in which the project is located and the townships adjacent thereto - Employer requesting hearing to make representations on numerous matters - Hearing not necessary - Certificate issuing	
PROCON DEVELOPMENTS LTD.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL	(Apr.)
	459
Construction Industry - Bargaining Unit - Certification - Practice and Procedure - Officer reporting back to Board on employee list problems - Respondent asking for hearing to make submissions on report but later requesting cancellation of hearing - Union opposing request - Hearing proceeding in absence of respondent - No valid reason for cancellation - Remaining issues in certification resolved by Board - Certificates issuing	
B.J. LAVERTY CONSTRUCTION SEBRINGVILLE INC.; RE L.I.U.N.A., LOCAL 506	(May)
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Construction Industry - Bargaining Unit - Certification - Practice and Procedure - Reconsideration - Applicant requesting variation of clarity note in earlier certification decision - Clarity note not part of unit description - Certificate issued subject to terms of Board decision, including any clarity note - Reconsideration denied	
CONCRETE SYSTEMS, 799316 ONTARIO INC. C.O.B. AS; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL.....	(Mar.)
	229

Construction Industry - Bargaining Unit - Certification - Related Employer - Labourers' union seeking certification under provincial agreement for employees of related employer - Bricklayers' union already holding bargaining rights for bricklayers' assistants with related employer - Labourers' seeking bargaining unit description excluding bricklayers' assistants for whom other union holds bargaining rights - Certificate issuing		
GOTTCOM CONTRACTORS LIMITED, GOTTARDO PROPERTIES LIMITED, GOTTARDO CONTRACTING (1980) INC., GOTTARDO CONTRACTING CO. LIMITED, GOTTARDO HOLDINGS COMPANY LTD., GOTTARDO MANAGEMENT LIMITED, AND GOTTARDO CORPORATION; RE L.I.U.N.A., LOCAL 506; RE B.M.I.U., LOCAL 1.....(Jan.)	25	
Construction Industry - Bargaining Unit - Settlement - Termination - Union agreeing on basis of information provided by employer that there was a single employee in the bargaining unit - Union later disputing this information - No allegation of fraud - Allowing union to rescile from agreement as reflected in Officer's Report would undermine integrity of Board process and fundamental role of Labour Relations Officers		
LORNE'S ELECTRIC - 291360 ONTARIO LTD.; RE KLAUS WILLROIDER; RE I.B.E.W., I.B.E.W. CONSTRUCTION COUNCIL OF ONTARIO, I.B.E.W., LOCALS 105, 115, 120, 303, 353, 402, 530, 586, 773, 804, 894, 1687, AND 1739.....(Sept.)	935	
Construction Industry - Certification - Employee - Individual allegedly "just happened to show up" at worksite to retrieve a belt and did some unpaid labour - Individual doing bargaining unit work on application date and thus was employee for purposes of certification application - Certificate issuing		
MED SIDING; RE C.A.W., LOCAL 27; RE GROUP OF EMPLOYEES	1072	(Oct.)
Construction Industry - Certification - Employer engaged in drilling to obtain rock and soil samples for engineering firms - Engineering firms using samples to determine appropriateness of area for future construction - Time lag of up to 10 years between drilling and commencement of actual construction work - Employer not engaged in construction industry		
ATCOST SOIL DRILLING INC.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES(Jan.)	1	
Construction Industry - Certification - Employer engaged primarily in cleaning and maintenance, but having four employees hired to paint university student residence - Primary purpose of painting was decoration rather than maintenance - Employer engaged in construction industry - Certificate issuing		
COURTESY MAINTENANCE, COURTESY GROUP INC. C.O.B.; RE P.A.T., LOCAL 1824.....(Nov.)	1124	
Construction Industry - Certification - Evidence - Membership Evidence - Practice and Procedure - Proper employee notice requiring extension of terminal date in certification application - Board permitting union to file additional membership evidence up to new terminal date		
SPENCER J. HAWKES INC.; RE IRONWORKERS DISTRICT COUNCIL OF ONTARIO	966	(Sept.)
Construction Industry - Certification - Intimidation and Coercion - Membership Evidence - Unfair Labour Practice - Employer alleging that union's membership evidence was obtained in violation of Act - Union representative making statements to employees that if they did not sign union cards they would be removed from work site - Board finding that union was only attempting to enforce its collective agreement with the general contractor - No improper conduct - Certificates issuing		
CUNEO INTERIORS; RE C.J.A., LOCAL 27.....(May)	499	

Construction Industry - Certification - Natural Justice - Practice and Procedure - Reconsideration

- Terminal Date - Employer requesting reconsideration of certifications on grounds employees failed to receive notice - Employer pleading own failure either to post Notice of Application or to file Return of Posting Card - Union filed Advice of Posting Card but did not fill in necessary information - Union filing Card after terminal date - Not unreasonable to expect union to act with promptness and diligence in checking posting where union asking Board to exercise discretion to certify without a hearing - Board directing matter to be listed for hearing representation on notice issues

VISSERS NURSERY; RE L.I.U.N.A., LOCAL 183 (Sept.) 989

Construction Industry - Certification - Petition - Reconsideration - Union leading evidence showing sole petitioner had lied during evidence at certification application - Credibility critical in one-person petition -Union satisfying criteria of new evidence and due diligence - Certificate issuing

INZOLA CONSTRUCTION (1976) LIMITED; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GROUP OF EMPLOYEES (Jan.) 53

Construction Industry - Certification - Practice and Procedure - Certification application mailed to Board by registered mail on a Sunday deemed to have been filed on that date - Employer requesting Board to depart from its usual practice in construction industry of determining membership support as of application date - Board explaining its rationale for different practices in the construction industry - Board not departing from its usual practice in this case

AL GORDON ELECTRIC LIMITED; RE I.B.E.W., LOCAL 120; RE GROUP OF EMPLOYEES (June) 637

Construction Industry - Certification - Practice and Procedure - Parties agreeing to removal of two names from "Schedule A" employee list - Employer later asserting these individuals should be included for purposes of count - Board not permitting parties to rescind from agreement

BEAVERBROOK ESTATES INC.; RE L.I.U.N.A., LOCAL 183 (Jan.) 13

Construction Industry - Certification - Practice and Procedure - Union making sixth certification application for substantially the same group of employees in two months - Respondent employer requesting that application be dismissed and bar imposed - Board disagreeing with argument that the mere frequency of applications warrants dismissal and a bar - Repeated applications may be vexatious or an abuse of process but these concerns not raised here - Motion dismissed - Certification application to proceed

D.J. VENASSE CONSTRUCTION LIMITED; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL (Apr.) 419

Construction Industry - Charter of Rights - Judicial Review - Union Successor Status - Two locals of same union merged - Officers and members of one local opposed - Employer given status to intervene but not permitted to lead evidence on the consequences of the merger on its business operations - Merger in compliance with union constitution - Constitution not requiring membership approval - Divisional Court upholding Board decision - Failure to hold vote no infringement of Charter freedom of association - Board operated within limits of statutory discretion in making successor declaration

I.B.E.W., LOCAL 594, PATRICK WYSE AND MAURICE WALSH; RE I.B.E.W., LOCAL 586 (Dec.) 1365

Construction Industry - Collective Agreement - Construction Industry Grievance - Evidence - Union claiming right to preparation of interference drawings contracted out by employer - Union claim based on agreement rights to 'preparation of all shop and filed sketches used in

fabrication and erection' and to 'all other work included in the jurisdictional claims' of union - Board admitting extrinsic evidence - Interference drawing not a 'sketch' - Right to 'all other work' claimed by union covers no more than work similar in nature to work specifically claimed in agreement - Application dismissed

ROBERT LAFRAMBOISE MECHANICAL LIMITED; RE S.M.W., LOCAL 47..... 947

Construction Industry - Collective Agreement - Jurisdictional Dispute - General contractor assigning installation of patient service modules in hospital to its own carpenters and labourers - UA and IBEW claiming work -General contractor having no collective agreements with UA or IBEW but area past practice favouring claim - IBEW provincial agreement containing restrictive hiring practices - Practical effect of claim is to make it a request that the Board direct the general contractor to subcontract the work - Assignment of work to carpenters and labourers confirmed

PIGOTT CONSTRUCTION LIMITED AND C.J.A., LOCAL 27; RE U.A., LOCAL 46 AND I.B.E.W., LOCAL 353; RE L.I.U.N.A., LOCAL 506(Apr.) 441

Construction Industry - Construction Industry Grievance - Collective agreement requiring employers to make remittances to union's benefit fund for purchase of, amongst other things, OHIP - *Employer Health Tax Act* imposing tax on employers and eliminating the payment of OHIP premiums -Whether employers are relieved from the obligation to make payments to the fund which are referable to OHIP premiums - Doctrines of frustration and unjust enrichment not applicable - Employers not entitled to abatement of their obligation to make remittances in full

HALTON FORMING LTD., THE RESIDENTIAL LOW-RISE FORMING CONTRACTORS' ASSOCIATION OF METROPOLITAN TORONTO AND VICINITY AND; RE L.I.U.N.A., LOCAL 183; RE MUR-WAL FORMING INC.; RE ORTA FORMING & CONST. LIMITED; RE PARKWALL FORMING LTD.; RE TESKEY CONSTRUCTION CO. LTD.; RE MALNIC CONTRACTING INC.; RE BACARDI FOUNDATIONS LTD.; RE A.R.G. CONSTRUCTION CORPORATION; RE CEDAR FORMING LIMITED; RE GREENWALL FORMING LIMITED; RE PEEL FORMING LIMITED; RE POURED WALL CORP. LTD.; RE TORONTO ZENITH CONTRACTING (1982) LTD.; RE TRU-WALL GROUP LIMITED(May) 553

Construction Industry - Construction Industry Grievance - Collective agreement requiring payment by "cash" or "cheque" - Employer paying by direct deposit into employees accounts with financial institution - Payment by "cash" or "cheque" meaning payment of legal tender directly to worker, not through agent financial institution

LORLEA STEELS, A DIVISION OF JANNOCK STEEL FABRICATING COMPANY; RE ONTARIO SHEET METAL WORKERS' CONFERENCE(Jan.) 57

Construction Industry - Construction Industry Grievance - Damages - Union seeking enforcement of a collective agreement clause providing for a penalty of one percent per day compounded interest for the late payment of contributions to benefit plans - Whether payment required by clause is a penalty or an enforceable pre-estimate of losses - Board finding interest rate unconscionable and a penalty - Board declining to enforce penalty

COMMERCIAL CONTRACTING CORPORATION OF CANADA, LIMITED; RE I.B.E.W., LOCAL 894.....(Apr.) 399

Construction Industry - Construction Industry Grievance - Discharge - Grievor discharged for insubordination shortly after hiring - Board considering appropriateness of "progressive

discipline" in construction industry - Board unwilling to substitute lesser penalty under circumstances -Grievance dismissed	
ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION AND; RE ONTARIO ALLIED TRADES CONSTRUCTION COUNCIL AND TEAMSTERS UNION.....	(Dec.)
	1308
Construction Industry - Construction Industry Grievance - Discharge - Union grieving respondent's refusal to hire two rodmen - Rodmen had been discharged in 1985 by respondent for intoxication - Neither employee had grieved discharge - Board finding that respondent acted unreasonably in refusing to re-hire rodmen - Respondent had failed to notify rodmen at time of discharge in 1985 that they were not eligible for re-hire	
STONE & WEBSTER CANADA LIMITED; RE B.S.O.I.W., LOCAL 786.....	(July)
	801
Construction Industry - Construction Industry Grievance - Employee assigned to light work in pallet yard as part of rehabilitation program following injury - Employee alleging layoff contrary to collective agreement - Employer arguing pallet yard work not covered by collective agreement - Pallet yard employees paid same wages as construction workers covered by agreement - Union dues deducted - Health and welfare and pension remittances made - Employer attempting to observe union jurisdiction claims in pallet yard - Employee covered by agreement - Employee laid off contrary to agreement	
ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, THE; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL	(Oct.)
	1031
Construction Industry - Construction Industry Grievance - Evidence - Practice and Procedure - Party seeking production of documents through a summons need not demonstrate any more than that the documents sought are arguably relevant to the matters at issue - Board not requiring immediate production of large volume of documents of uncertain relevance - Applicant free to pursue demands for any of these documents at a later point in proceedings where relevance and probative value established	
ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, ONTARIO HYDRO; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL; RE I.U.O.E., LOCAL 793	(Sept.)
	930
Construction Industry - Construction Industry Grievance - Health and Safety - Employer arranging health and safety training session for Workplace Hazardous Materials Information System on Friday afternoon - Session held at union hall and open to union members only - Union business representatives attending - Employer and union cooperating in providing refreshments - <i>Occupational Health and Safety Act</i> requiring employer to provide instructions but silent on payment - Employer failing to inform employees at meeting that attendance voluntary and unpaid - Employees entitled to wages and benefits for time at session	
ROSMAR DRYWALL & ACOUSTICS LIMITED; RE C.J.A., LOCAL 785.....	(Feb.)
	214
Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - General contractor subletting the placing of concrete toppings at parking garage to trade contractor who assigned the work to labourers - Ironworkers asking general contractor to take back work and subcontract it to a company which had a collective agreement with the Ironworkers - General contractor telling subcontractor that it should employ Ironworkers but subcontractor not complying - Ironworkers filing grievance against general contractor for breach of subcontracting clause - Whether circumstances giving rise to grievance constituting jurisdictional dispute - General contractor acting as 'agent' for Ironworkers when it made demand of subcontractor - Circumstances constituting a jurisdictional dispute	
FOUNDATION COMPANY OF CANADA LIMITED; RE B.S.O.I.W., LOCAL UNION 721; RE L.I.U.N.A., LOCAL 506; RE DURON ONTARIO LTD.	(May)
	521

Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Practice and Procedure - Grievance by respondent union alleging violation of subcontracting clause in collective agreement withdrawn - Whether Board having jurisdiction to continue to hear jurisdictional dispute where no one is requesting that the assignment of work be changed - Board excusing its discretion to not inquire further into jurisdictional dispute - Board's practice is not to embark upon inquiries into academic questions - Advance rulings inappropriate - Labour relations considerations favour not proceeding further

E.S. FOX LIMITED, PRO INSUL LIMITED, S.M.W., LOCAL 562; RE H.F.I.A., LOCAL 95; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP; RE MASTER INSULATORS' ASSOCIATION OF ONTARIO INC. (May)

504

Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Union grieving employer's subcontracting of work to complainant - Complainant bringing application under jurisdictional dispute provisions - Complainant requesting Board direction that union cease requiring employer to refrain from purchasing from complainant - Board having no jurisdiction to deal with complaint under jurisdictional dispute provisions

E. H. PRICE LIMITED; RE S.M.W., LOCAL 47, ONTARIO SHEET METAL WORKERS' CONFERENCE; RE U.S.W.A., LOCAL 8990, ONTARIO SHEET METAL AND AIR HANDLING GROUP AND MEGATECH CONTRACTING LIMITED (Dec.)

1263

Construction Industry - Construction Industry Grievance - Parties - Whether employers' organizations which are constituents of an employer bargaining agency are parties to construction industry referrals - No right to standing under Act - Board also rejecting right to party standing based on argument that their legal rights are affected by issue to be arbitrated - Issue is whether general contractors are bound to trade appendices to the collective agreement or only to local union schedules - No legal right to participate found in collective agreement - No special circumstances leading Board to exercise its discretion to give employers' organizations standing - Union local not entitled to standing - Union's interest akin to that of a commercial interest - Merits of grievance to be set down for hearing

JADDCO E. ANDERSON LTD.; RE L.I.U.N.A., LOCAL 1036 (May)

570

Construction Industry - Construction Industry Grievance - Sector Determination - Whether the construction of a highrise senior citizens home is a project falling within the ICI sector of the construction industry - Rooms not self-contained apartment units - Residents receiving daily care from nursing staff - Project found to be within ICI sector - Supplier of drywall offloading, conveying and stockpiling drywall with own employees - Supplier not having collective agreement with applicant union - In circumstances of case delivery of drywall not construction work and not covered by ICI agreement - Grievance alleging violation of subcontracting clause in ICI agreement dismissed

FOUR SEASONS DRYWALL; RE L.I.U.N.A., LOCAL 506..... (May)

525

Construction Industry - Construction Industry Grievance - Union referring grievance for arbitration under construction industry provisions - Union not certified to represent construction industry employees of employer - Collective agreement between employer and union not covering employees in construction industry - Employer and union both within definitions in construction industry provisions - Board having jurisdiction to hear referral under construction industry provisions

IDEAL RAILINGS LIMITED; RE C.J.A., LOCAL 27 (Dec.)

1283

Construction Industry - Evidence - Jurisdictional Dispute - Board agreeing to receive employer and area past practice evidence of conveyor system installation - Board declining to admit evidence of past practice of other employers in other job assignments - Past practice and

considerations of economy and efficiency are relevant to proper work assignment only if they can be tied to actual work in dispute

ACCO CANADIAN MATERIAL HANDLING, A DIVISION OF BABCOCK INDUSTRIES CANADA INC. AND IRONWORKERS DISTRICT COUNCIL OF ONTARIO AND B.S.O.I.W., LOCAL 700; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1244 ... (Sept.)

915

Construction Industry - Evidence - Jurisdictional Dispute - Practice and Procedure - Witness - Board power to compel the production of documents and to determine its own practice and procedure includes the power to direct that documents be made available for cross-examination - Board emphasizing the need to minimize document-related adjournments - Board directing further witnesses to bring documents relating to their testimony - Board directing respondent counsel to provide witnesses with copy of decision

ACCO CANADIAN MATERIAL HANDLING, A DIVISION OF BABCOCK INDUSTRIES CANADA INC. AND IRONWORKERS DISTRICT COUNCIL OF ONTARIO AND B.S.O.I.W., LOCAL 700; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1244(Aug.)

819

Construction Industry - Evidence - Related Employer - Sale of a Business - No one appearing for respondent companies at hearing - Act requiring respondent to adduce all material facts relevant to application, but not altering legal burden of proof - Where applicant union chooses to proceed in absence of respondents rather than enforce attendance, union must still adduce some evidence to support findings necessary to successful application - Absence of information particularly within knowledge of respondents should not stand in way of success - Board assessing evidence accordingly - Declaration issuing

DELTA ELECTRIC EASTERN LIMITED, DELTA ELECTRICAL & MECHANICAL INC., DELTA ELECTRICAL & MECHANICAL LIMITED AND DELTA ELECTRIC LTD.; RE I.B.E.W., LOCAL 353(Dec.)

1259

Construction Industry - Health and Safety - Picketing - Remedies - Strike - Board asked to declare that respondent employees had engaged in an unlawful strike by refusing to cross picket line established by another union - Argued that employees did not cross picket line because they believed it would be dangerous to do so - Picket line tension runs high but actual violence is rare - Board finding nothing in facts which would justify employees' refusal - Declaration of unlawful strike and direction to cease engaging in unlawful activity issuing

HORTON CBI, LIMITED; RE LEO E. EVANS, JOE L. DA SILVA, TERRANCE R. MCGUIRE, AND SANFORD JONES; RE B.B.F., LOCAL 128(June)

648

Construction Industry - Health and Safety - Strike - Unfair Labour Practice - Employer requiring all employees to wear bellyhooks, whether or not needed in work - Employees believing bellyhooks unsafe and refusing to wear as way of demonstrating refusal to use under any circumstances - Employer refusing to assign work to employees refusing to wear bellyhooks - Employer seeking illegal strike declaration and damages - Employees alleging reprisal contrary to *Occupational Health and Safety Act* - Refusal not justified under *Occupational Health and Safety Act* since mere wearing of bellyhooks not alleged to endanger - No refusal to work since no work assigned - Complaints and application dismissed

GILBERT STEEL LIMITED; RE B.S.O.I.W. LOCAL 721, GEORGE JONCAS, ALFIE THOMAS, AND AARON MURPHY ON THEIR OWN BEHALF AND ON BEHALF OF THE RESPONDENT UNION; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, ONTARIO HYDRO RE B.S.O.I.W., LOCAL 721, ON BEHALF OF ITS REINFORCING RODMEN NAMED IN SCHEDULE "B" TO THE COMPLAINT; RE B.S.O.I.W., LOCAL 721, GEORGE JONCAS, ALFIE THOMAS, JOHN DONALDSON AND AARON MURPHY(Feb.)

136

Construction Industry - Jurisdictional Dispute - Handling and installation of Hollywood Rail, Louden Rail, and support steel - Board considering collective bargaining relationships, skill and training, economy and efficiency, employer practice, area or industry practice, and employer preference - Board rejecting "end use" as appropriate consideration - Board directing work to be assigned to Ironworkers and Millwrights	
NEWMARCH INC. AND U.A., LOCAL 463; RE B.S.O.I.W. LOCAL 721; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO, ON ITS OWN BEHALF AND ON BEHALF OF LOCAL 2309.....	179
Construction Industry - Parties - Practice and Procedure - Termination - Applications to terminate bargaining rights of unions in the ICI sector of the construction industry - All affiliated bargaining agents must be named as respondents and given notice of the applications - Matters adjourned until proper parties named and given notice	
D-K CONSTRUCTION LTD.; RE ANGELO GANASSIN; RE C.J.A., LOCAL 785, AND THE ONTARIO PROVINCIAL COUNCIL; RE MICHAEL PARKER; RE L.I.U.N.A., LOCAL 1081, AND ONTARIO PROVINCIAL DISTRICT COUNCIL.....	503
Construction Industry - Related Employer - Employees of speciality contractor supervised by general contractor partially owned by same employer - "Control test" different in construction due to hiring hall requirements and to transitory nature of industry - Application dismissed	
CENTURY STORE FIXTURES LTD., CENTURY INTERIORS LTD., JASPER CONSTRUCTION INC.; RE C.J.A., LOCAL 27.....	1119
Construction Industry - Related Employer - Five corporations carrying on related activities - Whether Board should exercise its discretion to treat them as one employer - One of five corporations evincing willingness to revive other four dormant corporations to defeat bargaining rights of Carpenters Union with respect to the residential sector - Board making one employer declaration to protect those bargaining rights from erosion	
TACTIX CONSTRUCTION LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183	467
Construction Industry - Related Employer - Individual owning and operating small acoustic and drywall company in commercial and residential sectors in southwestern Ontario until company dissolution in 1981 - Same individual buying into and operating similar drywall company in same area from 1987 onward - Individual was "key man" in expertise and experience in each case - Six year gap no compelling reason for Board to decline related employer declaration - Declaration issuing	
KENT ACOUSTICS LIMITED, CITY ACOUSTICS LIMITED, J.L. ACOUSTICS LTD.; RE C.J.A., LOCAL 494.....	855
Construction Industry - Related Employer - Remedies - Landmark Contracting building and erecting silos pursuant to collective agreement with Ironworkers - Landmark Structures erecting elevated water tanks - Pre-conditions required for a one employer declaration admitted - Board declining to exercise its discretion to make a one employer declaration - No erosion of union's bargaining rights	
LANDMARK CONTRACTING LTD. AND LANDMARK STRUCTURES (ONTARIO) LTD.; RE B.S.O.I.W., LOCAL 721.....	660
Construction Industry - Related Employer - Sale of a Business - Owner of defunct company obtaining ownership interest in existing business - No sale of business - No accompanying	

expertise or active participation such as to make him "key man" in existing business - Related employer declaration inappropriate - Applications dismissed	
YOLA CONSTRUCTION LTD. AND K & Z CONSTRUCTION LTD.; RE L.I.U.N.A., LOCAL 506; RE B.A.C., LOCAL 2	(Mar.)
Construction Industry - Related Employer - Union having actual knowledge that companies were under common control and direction at least several years before filing application - Union having actual knowledge of loss of job opportunities and that work covered by its collective agreement was being performed by a related employer not bound to that agreement - Union delay causing respondents prejudice and affecting right of unrepresented employees to seek own bargaining agent or remain unrepresented - Application dismissed	
ANDREYNOLDS COMPANY LIMITED AND BILL BAILEY OF BELLEVILLE LIMITED; RE U.A., LOCAL 463	(Nov.)
Construction Industry - Sale of a Business - Small electrical contracting business voluntarily recognizing union to obtain journeymen and apprentice electricians - Business failed to obtain any such tradesmen from union and at no time employed anyone other than its sole owner - Owner closing business and becoming partner in another electrical contracting business - Owner selling all assets to new business and receiving additional payment in recognition of experience - New business acquiring benefit of proprietary skills in bid-oriented business - Fact that former business was one person business and unable to get expected tradesmen under collective agreement no reason to refuse sale of business declaration - Circumstances warranting protection of bargaining rights union acquired under voluntary recognition with former business - Board finding sale of business	
DELUXE ELECTRICAL CONTRACTOR LTD., DUPLEX ELECTRICAL LTD.; RE I.B.E.W., LOCAL 353	(Nov.)
Construction Industry - Sector Determination - Whether retirement home project falling within ICI or residential sector - Matter turning on degree of direct control over unit by resident - Project falling under ICI sector	
FUTURE CARE LIMITED AND KUCO CONSTRUCTION LIMITED; RE L.I.U.N.A., LOCAL 1036	(Aug.)
Construction Industry - Termination - Union arguing application should be dismissed because four of five employees at work on application date were recalled contrary to collective agreement and therefore unlawfully at work - Employees not referred to union hall before recall - Employer not altering layoff and recall procedure - No evidence of union ever grievance failure to refer to union before recall - Same five employees would have been at work on application date whether or not agreement complied with - Employer not manipulating recall to assist termination application - Board directing representation vote	
OTTAWA GREENBELT CONSTRUCTION LIMITED; RE UBALDO MARCHESCHI ON HIS OWN BEHALF AND ON BEHALF OF A GROUP OF EMPLOYEES; RE I.U.O.E., LOCAL 793	(Nov.)
Construction Industry Grievance - Abandonment - Bargaining Rights - Construction Industry - Union certified in 1976 - No Board Report issued in late 1977 - Province-wide ICI bargaining regime imposed six months later in 1978 - Union not interacting with employer in 12 year period between No Board Report and filing of present grievance - Union attempted to organize employees in 1981 - Activity following province-wide bargaining relevant in determining whether abandonment had occurred in prior six month interval - Interval followed only by conduct demonstrating union belief it held no bargaining rights - No minimum period for finding of abandonment - Bargaining rights abandoned - Application dismissed	
MARINELAND OF CANADA INC.; RE C.J.A., LOCAL 38; RE GROUP OF EMPLOYEES	(Dec.)

Construction Industry Grievance - Accreditation - Collective Agreement - Construction Industry - Employer signing supplementary document to collective agreement between union and contractors association - Employer not member of association and signing subsequent to main parties - Employer not signing later agreement which extended terms of first agreement - Employer bound by bargaining relationship and accreditation provisions STEELFABCO INC.; RE S.M.W., LOCAL 562	(Jan.)	83
Construction Industry Grievance - Adjournment - Construction Industry - Judicial Review - Natural Justice - Practice and Procedure - Grievance filed by union alleging employer breached collective agreement by not hiring through hiring hall - Employer asking by letter for adjournment - Employer not appearing at hearing - Employer found to have breached collective agreement - Board not granting adjournments unless on consent of parties - Otherwise request must be made before panel on hearing date - Employer's reconsideration request denied - Employer bringing application for judicial review on the ground that the Board failed to comply with the rules of natural justice by proceeding with hearing in employer's absence - Judicial review dismissed by Divisional Court TODD RAMSAY INTERIORS INC. AND JAMES R. TODD; RE C.J.A., LOCAL 93 AND THE ONTARIO LABOUR RELATIONS BOARD	(June)	748
Construction Industry Grievance - Adjournment - Construction Industry - Jurisdictional Dispute - Natural Justice - Practice and Procedure - Union alleging employer failed to hold mark-up meeting contrary to collective agreement - Intervener union seeking adjournment to permit disposal of issue as jurisdictional dispute - Union not seeking direction with respect to work assignment, but rather relief from conduct of employer - Union not required to file and be successful in jurisdictional dispute before proceeding with referral of construction industry grievance - Board proceeding with grievance referral - Board giving all would-be parties opportunity to make representations on notice issue ACCO CANADIAN MATERIAL HANDLING, A DIVISION OF BABCOCK INDUSTRIES CANADA INC.; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1592; RE IRONWORKERS DISTRICT COUNCIL OF ONTARIO AND B.S.O.I.W., LOCAL 700; RE THE ASSOCIATION OF MILLWRITING CONTRACTORS OF ONTARIO INC.; RE ALLIED CONVEYORS LIMITED; RE ADAM CLARK LIMITED; RE COMSTOCK CANADA; RE NICHOLLS-RADTKE & ASSOCIATES LTD.; RE STATE CONTRACTORS INCORPORATED	(Oct.)	993
Construction Industry Grievance - Adjournment - Construction Industry - Jurisdictional Dispute - Practice and Procedure - Union alleging employer failed to hold mark-up meeting contrary to collective agreement - Intervener union seeking adjournment to permit disposal of issue as jurisdictional dispute - A grievance which raises an issue of work assignment, even if only at the remedy stage, brings a dispute within the jurisdictional dispute provisions of the Act - Jurisdictional aspect not arising until breach of collective agreement shown - Board reluctant to embark on jurisdictional dispute where unclear applicant union will succeed in grievance, or a useful purpose be served - Board directing scheduling of grievance referral hearing on allegation that agreement breached - If breach established, Board to convene further hearing on entitlement to damages - If then apparent that applicant union's entitlement to damages is consequent on assignment of work, intervener and any other union having fourteen days to file jurisdictional dispute - If jurisdictional dispute filed, Board to defer consideration of that aspect of applicant union's claim for damages pending disposition of jurisdictional dispute SCHINDLER ELEVATOR CORPORATION, THE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION AND ONTARIO HYDRO, AND; RE THE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL ON BEHALF OF LAKE ONTARIO DISTRICT COUNCIL OF C.J.A.; RE I.U.E.C., LOCAL 50	(Oct.)	1092

Construction Industry Grievance - Adjournment - Construction Industry - Practice and Procedure

- Parties requesting that Board adjourn hearing date - Chronology indicating that on at least three separate occasions the parties had agreed to adjourn hearing dates which had been scheduled either at their specific request or in consultation with them - Parties reminded of institutional concerns of Board - Increased risk that adjournment will not be granted where cogent reason for request not provided to Board - Proceeding adjourned *sine die*

W.G. GALLAGHER CONSTRUCTION LIMITED; RE THE ONTARIO COUNCIL OF P.A.T.; RE P.A.T., DISTRICT COUNCIL 46.....(June)

744

Construction Industry Grievance - Arbitration - Construction Industry - Practice and Procedure -

Employer seeking arbitration of claim against individual employees - Union and employees alleging that failure to serve grievance on individual employees meant no delivery on "other party" as required by Act - "Other party" is local union, even where relief sought against individual employee - Board dismissing one of grievances for delay in filing without reasonable explanation

ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, THE; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL AND L.I.U.N.A. AND WALTER FOUGERE; RE DONALD E. HICKEY AND TEAMSTERS' UNION.....(Mar.)

243

Construction Industry Grievance - Arbitration - Construction Industry - Practice and Procedure -

Union seeking advisory opinion on interpretation of collective agreement - Neither Union nor employer having taken action to assert their respective interpretations in concrete form - Grievance premature - Grievance dismissed without prejudice to refile in appropriate circumstances

I.B.E.W., AND THE INTERNATIONAL BROTHERHOOD CONSTRUCTION COUNCIL OF ONTARIO AND THE I.B.E.W., LOCAL 115; RE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO ON BEHALF OF ALL CONTRACTOR MEMBERS OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF QUINTE/ST. LAWRENCE AND THE ELECTRICAL CONTRACTORS ASSOCIATION OF QUINTE/ST. LAWRENCE(Mar.)

283

Construction Industry Grievance - Collective Agreement - Construction Industry - Evidence -

Union claiming right to preparation of interference drawings contracted out by employer - Union claim based on agreement rights to 'preparation of all shop and field sketches used in fabrication and erection' and to 'all other work included in the jurisdictional claims' of union - Board admitting extrinsic evidence - Interference drawing not a 'sketch' - Right to 'all other work' claimed by union covers no more than work similar in nature to work specifically claimed in agreement - Application dismissed

ROBERT LAFRAMBOISE MECHANICAL LIMITED; RE S.M.W., LOCAL 47.....(Sept.)

947

Construction Industry Grievance - Construction Industry - Collective agreement requiring employers to make remittances to union's benefit fund for purchase of, amongst other things, OHIP - *Employer Health Tax Act* imposing tax on employers and eliminating the payment of OHIP premiums - Whether employers are relieved from the obligation to make payments to the fund which are referable to OHIP premiums - Doctrines of frustration and

unjust enrichment not applicable - Employers not entitled to abatement of their obligation to make remittances in full

HALTON FORMING LTD., THE RESIDENTIAL LOW-RISE FORMING CONTRACTORS' ASSOCIATION OF METROPOLITAN TORONTO AND VICINITY AND; RE L.I.U.N.A., LOCAL 183; RE MUR-WAL FORMING INC.; RE ORTA FORMING & CONST. LIMITED; RE PARKWALL FORMING LTD.; RE TESKEY CONSTRUCTION CO. LTD.; RE MALNIC CONTRACTING INC.; RE BACARDI FOUNDATIONS LTD.; RE A.R.G. CONSTRUCTION CORPORATION; RE CEDAR FORMING LIMITED; RE GREENWALL FORMING LIMITED; RE PEEL FORMING LIMITED; RE POURED WALL CORP. LTD.; RE TORONTO ZENITH CONTRACTING (1982) LTD.; RE TRU-WALL GROUP LIMITED (May)

553

Construction Industry Grievance - Construction Industry - Collective agreement requiring payment by "cash" or "cheque" - Employer paying by direct deposit into employees account with financial institution - Payment by "cash" or "cheque" meaning payment of legal tender directly to worker, not through agent financial institution

LORLEA STEELS, A DIVISION OF JANNOCK STEEL FABRICATING COMPANY; RE ONTARIO SHEET METAL WORKERS' CONFERENCE(Jan.)

57

Construction Industry Grievance - Construction Industry - Damages - Union seeking enforcement of a collective agreement clause providing for a penalty of one percent per day compounded interest for the late payment of contributions to benefit plans - Whether payment required by clause is a penalty or an enforceable pre-estimate of losses - Board finding interest rate unconscionable and a penalty - Board declining to enforce penalty

COMMERCIAL CONTRACTING CORPORATION OF CANADA, LIMITED; RE I.B.E.W., LOCAL 894.....(Apr.)

399

Construction Industry Grievance - Construction Industry - Discharge - Grievor discharged for insubordination shortly after hiring - Board considering appropriateness of "progressive discipline" in construction industry - Board unwilling to substitute lesser penalty under circumstances - Grievance dismissed

ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION AND; RE ONTARIO ALLIED TRADES CONSTRUCTION COUNCIL AND TEAMSTERS UNION.....(Dec.)

1308

Construction Industry Grievance - Construction Industry - Discharge - Union grieving respondent's refusal to hire two rodmen - Rodmen had been discharged in 1985 by respondent for intoxication - Neither employee had grieved discharge - Board finding that respondent acted unreasonably in refusing to re-hire rodmen - Respondent had failed to notify rodmen at time of discharge in 1985 that they were not eligible for re-hire

STONE & WEBSTER CANADA LIMITED; RE B.S.O.I.W., LOCAL 786.....(July)

801

Construction Industry Grievance - Construction Industry - Employee assigned to light work in pallet yard as part of rehabilitation program following injury - Employee alleging layoff contrary to collective agreement - Employer arguing pallet yard work not covered by collective agreement - Pallet yard employees paid same wages as construction workers covered by agreement - Union dues deducted - Health and welfare and pension remittances made - Employer attempting to observe union jurisdiction claims in pallet yard - Employee covered by agreement - Employee laid off contrary to agreement

ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, THE; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL(Oct.)

1031

Construction Industry Grievance - Construction Industry - Evidence - Practice and Procedure - Party seeking production of documents through a summons need not demonstrate any more

than that the documents sought are arguably relevant to the matters at issue - Board not requiring immediate production of large volume of documents of uncertain relevance - Applicant free to pursue demands for any of these documents at a later point in proceedings where relevance and probative value established

ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, ONTARIO HYDRO, RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL; RE I.U.O.E, LOCAL 793

930

Construction Industry Grievance - Construction Industry - Health and Safety - Employer arranging health and safety training session for Workplace Hazardous Materials Information System on Friday afternoon - Session held at union hall and open to union members only - Union business representatives attending - Employer and union cooperating in providing refreshments - *Occupational Health and Safety Act* requiring employer to provide instructions but silent on payment - Employer failing to inform employees at meeting that attendance voluntary and unpaid - Employees entitled to wages and benefits for time at session

ROSMAR DRYWALL & ACOUSTICS LIMITED; RE C.J.A., LOCAL 785..... (Feb.)

214

Construction Industry Grievance - Construction Industry - Jurisdictional Dispute - General contractor subletting the placing of concrete toppings at parking garage to trade contractor who assigned the work to labourers - Ironworkers asking general contractor to take back work and subcontract it to a company which had a collective agreement with the Ironworkers - General contractor telling subcontractor that it should employ Ironworkers but subcontractor not complying - Ironworkers filing grievance against general contractor for breach of subcontracting clause - Whether circumstances giving rise to grievance constituting jurisdictional dispute - General contractor acting as 'agent' for Ironworkers when it made demand of subcontractor - Circumstances constituting a jurisdictional dispute

FOUNDATION COMPANY OF CANADA LIMITED; RE B.S.O.I.W., LOCAL UNION 721; RE L.I.U.N.A., LOCAL 506; RE DURON ONTARIO LTD. (May)

521

Construction Industry Grievance - Construction Industry - Jurisdictional Dispute - Practice and Procedure - Grievance by respondent union alleging violation of subcontracting clause in collective agreement withdrawn - Whether Board having jurisdiction to continue to hear jurisdictional dispute where no one is requesting that the assignment of work be changed - Board excusing its discretion to not inquire further into jurisdictional dispute - Board's practice is not to embark upon inquiries into academic questions - Advance rulings inappropriate - Labour relations considerations favour not proceeding further

E.S. FOX LIMITED, PRO INSUL LIMITED, S.M.W., LOCAL 562; RE H.F.I.A., LOCAL 95; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP; RE MASTER INSULATORS' ASSOCIATION OF ONTARIO INC. (May)

504

Construction Industry Grievance - Construction Industry - Jurisdictional Dispute - Union grieving employer's subcontracting of work to complainant - Complainant bringing application under jurisdictional dispute provisions - Complainant requesting Board direction that union cease requiring employer to refrain from purchasing from complainant - Board having no jurisdiction to deal with complaint under jurisdictional dispute provisions

E. H. PRICE LIMITED; RE S.M.W., LOCAL 47, ONTARIO SHEET METAL WORKERS' CONFERENCE; RE U.S.W.A., LOCAL 8990, ONTARIO SHEET METAL AND AIR HANDLING GROUP AND MEGATECH CONTRACTING LIMITED (Dec.)

1263

Construction Industry Grievance - Construction Industry - Parties - Whether employers' organizations which are constituents of an employer bargaining agency are parties to construction industry referrals - No right to standing under Act - Board also rejecting right to party standing based on argument that their legal rights are affected by issue to be arbitrated -

Issue is whether general contractors are bound to trade appendices to the collective agreement or only to local union schedules - No legal right to participate found in collective agreement - No special circumstances leading Board to exercise its discretion to give employers' organizations standing - Union local not entitled to standing - Union's interest akin to that of a commercial interest - Merits of grievance to be set down for hearing	
JADDCO E. ANDERSON LTD.; RE L.I.U.N.A., LOCAL 1036	(May) 570
Construction Industry Grievance - Construction Industry - Sector Determination - Whether the construction of a highrise senior citizens home is a project falling within the ICI sector of the construction industry - Rooms not self-contained apartment units - Residents receiving daily care from nursing staff - Project found to be within ICI sector - Supplier of drywall offloading, conveying and stockpiling drywall with own employees - Supplier not having collective agreement with applicant union - In circumstances of case delivery of drywall not construction work and not covered by ICI agreement - Grievance alleging violation of subcontracting clause in ICI agreement dismissed	
FOUR SEASONS DRYWALL; RE L.I.U.N.A., LOCAL 506	(May) 525
Construction Industry Grievance - Construction Industry - Union referring grievance for arbitration under construction industry provisions - Union not certified to represent construction industry employees of employer - Collective agreement between employer and union not covering employees in construction industry - Employer and union both within definitions in construction industry provisions - Board having jurisdiction to hear referral under construction industry provisions	
IDEAL RAILINGS LIMITED; RE C.J.A., LOCAL 27	(Dec.) 1283
Construction Industry Grievance - Damages - Judicial Review - Remedies - Board decision that failure to hold mark-up was a breach of the collective agreement was not patently unreasonable - Assessment of damages not unreasonable - Application dismissed	
ONTARIO HYDRO AND ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO SHEET METAL WORKERS' AND U.A. AND THE O.L.R.B.....	(Nov.) 1204
Crown Transfer - Colleges Collective Bargaining Act - Crown contracting out operation and maintenance of campground and access point in provincial park to community college - Board having no jurisdiction to issue a declaration under the <i>Crown Transfers Act</i> where transfer is from the Crown to a community college - Application dismissed	
ALGONQUIN COLLEGE OF APPLIED ARTS AND TECHNOLOGY, THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF NATURAL RESOURCES AND THE BOARD OF GOVERNORS OF; RE O.P.S.E.U.	(June) 644
Crown Transfer - Respondent partnership entering into a contract with the Crown in respect of a creel survey - Creel survey part of Crown's fisheries program and had been performed by Crown employees in the past - Board finding creel survey to be an "undertaking" within the Act that had been "transferred" to an "employer" - Respondent was an "employer" regardless of whether the partnership hired anyone to assist partners in performing the survey - Respondent bound by collective agreement between union and Crown	
AGASSIZ FORESTRY/ENVIRONMENTAL SERVICES, THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF NATURAL RESOURCES, AND JOHN KNIGHT AND LORRAINE NORRIS C.O.B. AS; RE O.P.S.E.U.....	(June) 633
Damages - Construction Industry - Construction Industry Grievance - Union seeking enforcement of a collective agreement clause providing for a penalty of one percent per day compounded interest for the late payment of contributions to benefit plans - Whether payment	

required by clause is a penalty or an enforceable pre-estimate of losses - Board finding interest rate unconscionable and a penalty - Board declining to enforce penalty		
COMMERCIAL CONTRACTING CORPORATION OF CANADA, LIMITED; RE I.B.E.W., LOCAL 894.....	(Apr.)	399
Damages - Construction Industry Grievance - Judicial Review - Remedies - Board decision that failure to hold mark-up was a breach of the collective agreement was not patently unreasonable - Assessment of damages not unreasonable - Application dismissed		
ONTARIO HYDRO AND ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO SHEET METAL WORKERS' AND U.A. AND THE O.L.R.B.....	(Nov.)	1204
Damages - Discharge - Health and Safety - Remedies - Complainant was suddenly dismissed for tardiness after speaking to a Health and Safety Inspector - Complainant had a genuine tardiness problem but had not hitherto been disciplined or warned of discharge - Circumstances leading to inference of employer "anti-safety animus" - Complainant seeking monetary compensation only - Complainant was in jeopardy of discharge for tardiness and was already looking for other work - Remedy not meant as winfall - Board awarding \$4,500 damages		
RAMJIT, BO; RE MANUEL PUCHE.....	(Aug.)	874
Damages - Duty of Fair Representation - Remedies - Unfair Labour Practice - Union settling discharge grievance at arbitration - Complainant not adequately advised of terms of settlement requiring her to present herself to work by specified date or her grievance would be dismissed - Breach of fair representation duty - Failure to advise employee of settlement terms which cause employee to fail to comply leading to dismissal of grievance found to be arbitrary conduct - Damages for loss of opportunity - Quantum to be worked out by parties		
DENEAU, RHONDA; RE G.M.P., LOCAL #49; RE MULTI-FITTINGS	(Apr.)	423
Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Judicial Review - Lockout - Remedies - Stay - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees - Employer bringing application for a stay of the Board's decision pending the hearing of its application for judicial review - Stay application dismissed by High Court		
PLAZA FIBREGLAS MANUFACTURING LTD., PLAZA ELECTROPLATING LTD., CITCOR MANUFACTURING LTD. AND SABINA CITRON; RE ONTARIO LABOUR RELATIONS BOARD AND U.S.W.A.....	(June)	747
Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Lockout - Remedies - Unfair Labour Practice - Employer engaging in illegal lockout by		

transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches, to pay union's negotiating costs, to return work to original company and make no further movement without disclosure to union, to provide union with names and addresses of bargaining unit employees as of lockout date, and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees

PLAZA FIBERGLAS MANUFACTURING LIMITED AND PLAZA ELECTRO-PLATING LTD., CITCOR MANUFACTURING LTD., AND SABINA CITRON; RE U.S.W.A.....

192

Damages - Duty to Bargain in Good Faith - Unfair Labour Practice - Employer failing during collective bargaining to disclose to the union its intention to shut down one of its turbines - Breach of bargaining duty - Union claiming damages for loss of opportunity to negotiate with respect to the impact of the shut down, higher rate of pay for remaining employees, and expenses incurred by union in enforcing its rights - Insufficient evidence before Board to substantiate any compensatory relief

CANADIAN PACIFIC FOREST PRODUCTS LIMITED; RE LOCAL 865, I.U.O.E

492

Damages - Unfair Labour Practice - Board remaining seized with calculation of damages - Request by respondent employer for the panel to reconvene to clarify the relationship between an award under the *Employment Standards Act* and the Board's award of damages - Request premature - Parties should try to work out quantum of compensation themselves before coming to the Board for assistance

PLAZA FIBERGLAS MANUFACTURING LIMITED AND PLAZA ELECTRO-PLATING LTD., CITCOR MANUFACTURING LTD., AND SABINA CITRON; RE U.S.W.A.....

453

Dependent Contractor - Bargaining Unit - Certification - Judicial Review - Board not exceeding jurisdiction by issuing two certificates where application was for single "mixed" bargaining unit - Board correctly interpreting power to determine bargaining units - Board finding that owner/drivers and drivers were "employees" not patently unreasonable - Application dismissed

HAMILTON YELLOW CAB LIMITED AND TRANSPORTATION UNLIMITED INC.; RE R.W.D.S.U., AFL-CIO-CLC AND O.L.R.B.....(Nov.)

1199

Discharge - Certification - Certification Where Act Contravened - Discharge for Union Activities - Interference in Trade Unions - Unfair Labour Practice - Union supporters discharged during organizing campaign - Union having sufficient membership support for representation vote - Discharges likely to have had chilling effect - Vote not likely to show true wishes - Certificate issuing - Reinstatement, compensation, and posting orders made

REPLA LIMITED; RE C.J.A.

(Dec.)

Discharge - Certification Where Act Contravened - Interference in Trade Unions - Unfair Labour Practice - Employer making layoff prediction in bulletin to employees - Bulletin distributed during union organizing campaign - Key union organizer terminated - Refusal to hire per-

son who might have become a union supporter - Termination found to be a breach of the Act - Union certified without vote pursuant to s.8	
DAVID CHAPMAN'S ICECREAM LIMITED; RE U.F.C.W., LOCAL 175	(July) 778
Discharge - Colleges Collective Bargaining Act - Practice and Procedure - Unfair Labour Practice - Whether complainant theatre technician discharged because it was thought he was going to testify in the arbitration grievance filed by another employee - No reverse onus under CCBA - Complainant had to satisfy Board on balance of probabilities that there was no improper motive for the discharge - No part of motivation constituting breach of CCBA - Complaint dismissed	
SENECA COLLEGE OF APPLIED ARTS AND TECHNOLOGY; RE O.P.S.E.U. AND ITS LOCAL 561 AND LESLIE CHARBON	(June) 739
Discharge - Construction Industry - Construction Industry Grievance - Grievor discharged for insubordination shortly after hiring - Board considering appropriateness of "progressive discipline" in construction industry - Board unwilling to substitute lesser penalty under circumstances -Grievance dismissed	
ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION AND; RE ONTARIO ALLIED TRADES CONSTRUCTION COUNCIL AND TEAMSTERS UNION.....	(Dec.) 1308
Discharge - Construction Industry - Construction Industry Grievance - Union grieving respondent's refusal to hire two rodmen - Rodmen had been discharged in 1985 by respondent for intoxication - Neither employee had grieved discharge - Board finding that respondent acted unreasonably in refusing to re-hire rodmen - Respondent had failed to notify rodmen at time of discharge in 1985 that they were not eligible for re-hire	
STONE & WEBSTER CANADA LIMITED; RE B.S.O.I.W., LOCAL 786.....	(July) 801
Discharge - Damages - Health and Safety - Remedies - Complainant was suddenly dismissed for tardiness after speaking to a Health and Safety Inspector - Complainant had a genuine tardiness problem but had not hitherto been disciplined or warned of discharge - Circumstances leading to inference of employer "anti-safety animus" - Complainant seeking monetary compensation only - Complainant was in jeopardy of discharge for tardiness and was already looking for other work - Remedy not meant as winfall - Board awarding \$4,500 damages	
RAMJIT, BO; RE MANUEL PUCHE.....	(Aug.) 874
Discharge - Discharge for Union Activity - Interference in Trade Unions - Unfair Labour Practice - Employee discharged after minor misconduct - Employee had unsatisfactory performance record and knew his employment was in jeopardy - Employer knew employee had been involved in organizing campaign and might be on negotiating committee - While the appearance that a discharge is arbitrary or harsh may undermine an employer's assertion that union activity played no part in its decision, the appropriateness of discharge in the circumstances is not the issue before the Board - Evidence consistent with conclusion that termination was in no way caused by anti-union animus - Complaint dismissed	
SUDBURY YOUTH SERVICES INC.; RE O.P.S.E.U.	(Dec.) 1339
Discharge - Evidence - Health and Safety - Witness - Employee discharged after discussing petition for a lunchroom with another employee - Board permitting employee to recall employer's witness - Employee discharged for reasons unrelated to health and safety - Majority unwilling to exercise discretion under section 24(7) of <i>Occupational Health and Safety Act</i> to modify penalty - Exercise of discretion under Section 24(7) inappropriate where no con-	

nection between health and safety concern expressed by employee and employer conduct or actions - Complaint dismissed	
NATIONAL PLASTIC PROFILES INC.; RE STEVE MIKE SZEGHALMI	(Oct.) 1078
Discharge - Health and Safety - Complainant discharged for obtaining to standing near sandblasting where sand was irritating his face and eyes - Board ordering \$2,100 compensation for wage loss	
VILLAGE POOL & SPA; RE TIM V. PAULEY	(Sept.) 987
Discharge - Health and Safety - Employee discharged shortly after refusing to continue paint inventory work - Employee suffering from dizziness and headaches - Employer not providing convincing explanation for timing of discharge - Employer not discharging reverse onus - Employer in breach of Act	
TRELFORD AUTOMOBILE LIMITED, ROBERT TRELFORD; RE DEBORAH BROWN	(Nov.) 1155
Discharge - Health and Safety - Remedies - Occupational health nurse fired after refusing to return to the employer the keys to the filing cabinet holding employee health records - Whether discharge was for insubordination or acting in compliance with OHSA in protecting the confidentiality of employee health records - Nurse found to be genuinely motivated by a health and safety concern - Board not making positive finding that there is a duty under OHSA with which nurse was complying - Board finding it appropriate to review penalty imposed whether OHSA violated or not - All record of discharge to be removed from file - Written warning substituted for discharge	
BILT-RITE UPHOLSTERING CO. LTD.; RE JUDY BARRY	(July) 755
Discharge for Union Activities - Certification - Certification Where Act Contravened - Discharge - Interference in Trade Unions - Unfair Labour Practice - Union supporters discharged during organizing campaign - Union having sufficient membership support for representation vote - Discharges likely to have had chilling effect - Vote not likely to show true wishes - Certificate issuing - Reinstatement, compensation, and posting orders made	
REPLA LIMITED; RE C.J.A.	(Dec.) 1319
Discharge for Union Activity - Discharge - Interference in Trade Unions - Unfair Labour Practice - Employee discharged after minor misconduct - Employee had unsatisfactory performance record and knew his employment was in jeopardy - Employer knew employee had been involved in organizing campaign and might be on negotiating committee - While the appearance that a discharge is arbitrary or harsh may undermine an employer's assertion that union activity played no part in its decision, the appropriateness of discharge in the circumstances is not the issue before the Board - Evidence consistent with conclusion that termination was in no way caused by anti-union animus - Complaint dismissed	
SUDBURY YOUTH SERVICES INC.; RE O.P.S.E.U.	(Dec.) 1339
Duty of Fair Referral - Unfair Labour Practice - Complainant was listed higher than other referred workers, but not listed as having necessary skills for the job - Referral system putting onus on members to notify union of skills - Complainant not notifying union - Failure of union to inquire whether complainant had necessary skills no breach of duty of fair referral - Complaint dismissed	
PLENNEVAUX, ANTOINE A.; RE L.I.U.N.A., LOCAL 1036.....	(Dec.) 1314
Duty of Fair Representation - Abandonment - Bargaining Unit - Unfair Labour Practice - Union and employer agreeing to exclusion of casual employees from collective agreement coverage in 1985 - Complainants employed as casuals in 1986 and 1987 - Complainants earning less than if covered by agreement and complaining of breach of duty of fair representation -	

Board dismissing complaint - Union abandonment of casual representation rights occurring before employment of complainants - Complainants not employees in bargaining unit which union continued to be entitled to represent - Abandonment of part of bargaining unit not <i>per se</i> breach of fair representation duty where not arbitrary, discriminatory, or in bad faith - Union estopped from asserting representation rights in any case	
STOTHERS, TED AND BRUCE SKREPTAK; RE B.B.F, LOCAL 128; RE HYDRA-DYNE INDUSTRIAL CLEANING SERVICES LTD.....	(Mar.)
Duty of Fair Representation - Arbitration - Judicial Review - Unfair Labour Practice - Bargaining unit members petitioning union to seek judicial review of arbitration decision - Union declining to seek review - Decision based solely on legal opinions on chances of success - Board applying same standard as to decision whether to arbitrate a grievance - Union not obliged to seek review even if review supported by unit members - Union not obliged to seek review where chance of success - Union entitled to refuse on merits in context of other considerations grounded in union's role as exclusive bargaining agent and collective bargaining - Union failure to explain reasons not breach of duty - Complaint dismissed	247
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and not providing more information on pension formula - Union having little bargaining power because collective agreement in effect - No bad faith in way committee struck nor in lack of vote - Considerable efforts made to inform employees of contents of closure agreement after it had been signed - Complaint dismissed

PRYOR, ROGER ET AL; RE U.S.W.A., LOCAL 6896; RE CLIFFS OF CANADA LIMITED.....(July)

790

Duty to Bargain in Good Faith - Bargaining Unit - Collective Agreement - Final Offer Vote - Strike - Unfair Labour Practice - Voter eligibility in final offer vote limited under circumstances to persons who were employees in bargaining unit at time strike began, except where connection to workplace severed prior to date of vote - Injured employee with no expectation of returning to bargaining unit not eligible to vote - Good faith bargaining obligation not requiring employer to discuss new information with trade union prior to requesting or participating in final offer vote - Board refraining from exercising discretion to grant unlawful strike declaration or direction - Trade union refusal to execute collective agreement constituting under circumstances breach of duty to bargain in good faith - Board directing union to bargain in good faith, submit to vote results, and execute collective agreement reflecting final offer accepted in vote

MCINTYRE, WILF, FRED MIRON, ROLAND FRAYNE, NIELS HUSMAN, LARRY DUHAIME AND I.W.A. - CANADA, LOCAL 2693; RE PROSPER BRIZZARD, RICHARD BRIZZARD, ROBERT CASSON, RICHARD KOSKI, DAVID JAGGARD, MANFRED KRAUSE, ROBERT KRAUSE, DAVID ROSS, AULIUS TIITTO, DARRELL WESTOVER, RAYNARD JACOBSON, BRUCE NORDSTROM AND LARRY JAGGARD; RE GRAVEL AND LAKE SERVICES LIMITED (Oct.)

1052

Duty to Bargain in Good Faith - Damages - Final Offer Vote - Interference in Trade Unions - Judicial Review - Lockout - Remedies - Stay - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees - Employer bringing application for a stay of the Board's decision pending the hearing of its application for judicial review - Stay application dismissed by High Court

PLAZA FIBREGLAS MANUFACTURING LTD., PLAZA ELECTROPLATING LTD., CITCOR MANUFACTURING LTD. AND SABINA CITRON; RE ONTARIO LABOUR RELATIONS BOARD AND U.S.W.A.....(June)

747

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ence in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches, to pay union's negotiating costs, to return work to original company and make no further movement without disclosure to union, to provide union with names and addresses of bargaining unit employees as of lockout date, and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees	
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GENSPEC CONSTRUCTION INCORPORATED; RE C.J.A., LOCAL 27 AND ONTARIO LABOUR RELATIONS BOARD	486
Employee - Bargaining Unit - Certification - Employer seeking exclusion of operations supervisors - Predecessor position excluded by Board decision involving same union and employer for different bargaining unit ten years earlier - Exclusion issue not raised in subsequent bargaining - Application of <i>res judicata</i> or estoppel inappropriate - Passage of time and change in title providing credible context for assertion of changed circumstances warranting review - Interim certificate not precluding commencement of bargaining - Interim certificate issuing	
TRANSIT WINDSOR; RE A.T.U., LOCAL 616; RE GROUP OF EMPLOYEES..	94
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Employee - Certification - Practice and Procedure - Employee who verified time sheets and	

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ZAIDAN REALTY CORPORATION; RE U.P.G.W.A., LOCAL 1962 (Dec.)	1357
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Employee Reference - Employee status of psychologists employed by school board - Exercise of professional responsibilities which may include some professional supervision of other employees does not preclude being an employee for the purposes of the Act - Board finding individuals to be employees within the meaning of Act	
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Employee Reference - Practice and Procedure - Respondent complaining to Board about Labour Relations Officer designated to inquire into employee duties and responsibilities - Practice Note 4 establishing procedure for objections - Matters not specifically covered by Practice Note to be handled by analogy - Officer having discretion over proceedings within parameters of Practice Note and Board direction - Board ruling on complaint appropriate only after receipt of Officer's report and parties' submissions	
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Employer Support - Certification - Petition - Unfair Labour Practice - Whether employer providing union with names and addresses of employees during organizing campaign prohibiting certification of union - Provision of this information not constituting "support" within the	

meaning of s.13 - Meeting of employees called by employer factor to consider in looking at voluntariness of petition - No violation of Act when lead hands circulating petition expressed personal views on the consequences of unionization - Failure of one of two originators/circulators of petition to testify another factor to consider - Petition not voluntary - Certificate issuing

CONTINUOUS MINING SYSTEMS LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES (Apr.)

404

Employer Support - Evidence - Practice and Procedure - Termination - Applicant's evidence raising possibility employees given time off work to sign termination petition - Scenario relevant to voluntariness and employer support - Board ordering employer to provide union with opportunity to review and photocopy time cards for all bargaining unit employees

BERTO'S RESTAURANT INC.; RE MARJORIE MEIGHAN; RE HOTEL MOTEL AND RESTAURANT EMPLOYEES UNION, LOCAL 442 (Jan.)

17

Environmental Protection Act - Employee terminated for acting in compliance with, or seeking enforcement of, *Environmental Protection Act* - Employee not seeking reinstatement - Appropriate measure of damages actual loss and not notice period under *Employment Standards Act*

BAKELITE THERMOSETS LIMITED; RE VINOD MOHINDRA (Jan.)

3

Evidence - Adjournment - Certification - Membership Evidence - Petition - Trade Union - Trade Union Status - Technical amendment of application permitted to show true name of union - Membership cards headed by name of local union bringing application, but body of cards referring only to national union - Cards valid membership evidence for local union - Adjournment request on grounds of unavailability of objecting employee counsel denied - Petition circulated on employer premises and during working hours - Petitioners observed by foreman - Petition not voluntary expression of employee wishes - Certificate issuing

CHAPLEAU FOREST PRODUCTS LIMITED; RE IWA-CANADA, LOCAL 1-2995; RE GROUP OF EMPLOYEES (Dec.)

1243

Evidence - Adjournment - Judicial Review - Jurisdictional Dispute - Parties - Practice and Procedure - Demolition association requesting permission to intervene and asking for an adjournment - Association had not filed an intervention, attended the pre-hearing conference, or retained counsel - Board denying adjournment - Merits panel to decide intervener status issue - Board limiting the evidence of area and employer practice it will admit - Evidence limited to the demolition of similar structures in an operating environment in the Province of Ontario - Statute compelling Board to inquire into work involving the same or similar type of structure in the same or similar type of environment - Union bringing application for judicial review on the grounds that, *inter alia*, the Board committed an error of natural justice and exceeded its jurisdiction in denying adjournment and limiting the scope of admissible evidence - Judicial review dismissed by Divisional Court

FOSTER WHEELER LIMITED AND THE METROPOLITAN TORONTO DEMOLITION CONTRACTORS ASSOCIATION, THE ONTARIO LABOUR RELATIONS BOARD AND B.B.F., LODGE 128; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL AND L.I.U.N.A., LOCAL 1089 (May)

630

Evidence - Bargaining Rights - Representation Vote - Termination - Voluntary Recognition - Termination application brought within first year of voluntary recognition - Majority support in union cards signed at time of recognition is sufficient evidence to create a rebuttable presumption of union entitlement to representation - Act not anticipating representation

vote except where there is uncertainty of employee wishes at the time of recognition agreement - Board declining to hold vote and dismissing application

CEDARVALE WOODWORKING LIMITED; RE ANTONIO BERTUCCI; RE C.J.A., LOCAL 27.....(Aug.)

836

Evidence - Certification - Charter of Rights and Freedoms - Natural Justice - Practice and Procedure - Witness - Employee sidesperson while former MPP had objected in Legislature to provision of Act - Constitutionality of provision challenged in current proceedings - Employer alleging reasonable apprehension of bias - Board rejecting allegation - Board members appointed because of labour relations experience - Remarks made in different context nineteen years ago - Union seeking to call expert witness on content of freedom of association in European countries - Evidence analogous to legal argument about proper scope of freedom of association - Evidence not admissible in determining content of *Charter* freedom - Evidence admissible in determining whether provision reasonable limit to *Charter* freedom

PINKERTON'S OF CANADA; C.G.A.; RE RICHARD BIBEAULT; RE INCO LIMITED; RE ATTORNEY-GENERAL OF ONTARIO; RE NATIONAL PROTECTIVE SERVICES COMPANY LIMITED; RE GEORGE FAULKENBURG; RE BOARD OF MANAGEMENT FOR THE METROPOLITAN TORONTO ZOO; RE INTERNATIONAL UNION UNITED PLANT GUARDS, LOCAL 1962; RE RON SAXTON; RE BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE GORDON A. SOUTHORN; RE WACKENHUT OF CANADA LIMITED; RE SHANE FREEMAN; RE U.S.W.A.; RE LARRY BISHOP(Jan.)

68

Evidence - Certification - Construction Industry - Membership Evidence - Practice and Procedure - Proper employee notice requiring extension of terminal date in certification application - Board permitting union to file additional membership evidence up to new terminal date

SPENCER J. HAWKES INC.; RE IRONWORKERS DISTRICT COUNCIL OF ONTARIO

(Sept.)

Evidence - Certification - Fraud - Petition - Practice and Procedure - Reconsideration - Employee seeking reconsideration of Board's decision certifying union on basis that application tainted by fraud - Assertion that another employee circulated a petition but never intended to file it with the Board - Further allegation that this employee was acting as an agent for the union with respect to his petition activity - Union making non-suit application and electing to call no evidence - Reconsideration application dismissed - Circulator of the petition was not an agent or an officer of the union - No evidence as to why petition was not filed - Evidence consistent with theory that employees change their minds concerning support for a union - Objecting employees bound by the actions of their representative after selecting person to represent their interests in opposing the union

RUSSELL H. STEWART CONSTRUCTION COMPANY LIMITED; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES.....(Apr.)

464

Evidence - Certification - Membership Evidence - Board discretion to order certification vote or automatic certification here depending on validity of a single card - Card showing inconsistent statements as to whether \$1.00 paid - Board not permitting union to lead *viva voce* evidence as to whether \$1.00 paid - Payment of \$1.00 in doubt on face of card - Card not to be counted - Vote directed

599207 ONTARIO INC.; RE H.E.R.E., LOCAL 604, A.F. OF L., C.I.O., C.L.C.; RE GROUP OF EMPLOYEES

(Nov.)

Evidence - Certification - Membership Evidence - Membership evidence challenged on basis of

unspecified allegations - Board does not conduct examinations where no specific or explicit allegations of non-pay or non-sign	MISSISSAUGA HOSPITAL, THE; RE C.U.P.E.; RE C.U.O.E., LOCAL 101(Dec.)	1304
Evidence - Certification - Membership Evidence - Practice and Procedure - Trade union membership evidence lost in mail en route to Board - Union filing photocopies with Form 9 Declaration attesting to rigorous review and confirmation of validity of membership evidence - Board accepting photocopies as meeting requirements of Rules of Procedure - Photocopies backed by Declaration constituting "best evidence" under circumstances - Interim certificate issuing		
HOLT-MCDERMOTT MINE, AMERICAN BARRICK RESOURCES CORPORATION CARRYING ON BUSINESS AS; RE U.S.W.A.; RE GROUP OF EMPLOYEES	(Mar.)	267
Evidence - Certification - Membership Evidence - Practice and Procedures - Union business agent unable to recall whether he had reviewed information on Form 9 Declaration before signing and filing - Form 9 improper and unreliable under circumstances - Application dismissed		
599207 ONTARIO INC.; RE H.E.R.E., LOCAL 604, A.F. OF L., C.I.O., C.L.C..(Dec.)	1205	
Evidence - Certification - Trade Union - Trade Union Status - Board not satisfied that applicant organization had complied with International By-Laws in establishing Local Constitution - Applicant failing to file current International Constitution - Board unable to conclude whether applicant governed by Local or International Constitution - Board unable to conclude that applicant was "trade union" - Applicant filing photocopies of membership evidence - Photocopies not normally acceptable as membership evidence for certification in absence of satisfactory reasons why originals not available - Application dismissed		
OPERA GHOST PRODUCTIONS INC.; RE I.A.T.S.E., THEATRICAL WARDROBE UNION, LOCAL 822	(Mar.)	325
Evidence - Charter of Rights and Freedoms - Natural Justice - Practice and Procedure - Complainant asserting right to tape record proceedings and to rely upon recording as "transcript" - Complainant alleging Board's failure to keep official transcript a violation of common law, natural justice, and "fundamental justice" requirement of section 7 of <i>Charter</i> - No requirement in <i>Labour Relations Act</i> or <i>Statutory Powers Procedure Act</i> that Board produce official transcript - No common law or natural justice requirement - Board not persuaded section 7 of <i>Charter</i> raises obligation - Transcript unnecessary for judicial review applications given finality of Board decisions - Adoption of practice would interfere with expeditious and efficient resolution of labour relations disputes - Board exercising discretion to permit complainant to make unobtrusive personal recording subject to restrictions - Recording not official record and standing no higher than a party's notes for all purposes		
KOHUT, JOHN; RE C.A.W., AND ITS LOCAL 303; RE GENERAL MOTORS OF CANADA LIMITED	(Oct.)	1043
Evidence - Collective Agreement - Construction Industry - Construction Industry Grievance - Union claiming right to preparation of interference drawings contracted out by employer - Union claim based on agreement rights to 'preparation of all shop and filed sketches used in fabrication and erection' and to 'all other work included in the jurisdictional claims' of union - Board admitting extrinsic evidence - Interference drawing not a 'sketch' - Right to 'all other work' claimed by union covers no more than work similar in nature to work specifically claimed in agreement - Application dismissed		
ROBERT LAFRAMBOISE MECHANICAL LIMITED; RE S.M.W., LOCAL 47.....	(Sept.)	947
Evidence - Construction Industry - Construction Industry Grievance - Practice and Procedure -		

Party seeking production of documents through a summons need not demonstrate any more than that the documents sought are arguably relevant to the matters at issue - Board not requiring immediate production of large volume of documents of uncertain relevance - Applicant free to pursue demands for any of these documents at a later point in proceedings where relevance and probative value established

ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, ONTARIO HYDRO; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL; RE I.U.O.U., LOCAL 793..... (Sept.)

930

Evidence - Construction Industry - Jurisdictional Dispute - Board agreeing to receive employer and area past practice evidence of conveyor system installation - Board declining to admit evidence of past practice of other employers in other job assignments - Past practice and considerations of economy and efficiency are relevant to proper work assignment only if they can be tied to actual work in dispute

ACCO CANADIAN MATERIAL HANDLING, A DIVISION OF BABCOCK INDUSTRIES CANADA INC. AND IRONWORKERS DISTRICT COUNCIL OF ONTARIO AND B.S.O.I.W., LOCAL 700; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1244 ... (Sept.)

915

Evidence - Construction Industry - Jurisdictional Dispute - Practice and Procedure - Witness - Board power to compel the production of documents and to determine its own practice and procedure includes the power to direct that documents be made available for cross-examination - Board emphasizing the need to minimize document-related adjournments - Board directing further witnesses to bring documents relating to their testimony - Board directing respondent counsel to provide witnesses with copy of decision

ACCO CANADIAN MATERIAL HANDLING, A DIVISION OF BABCOCK INDUSTRIES CANADA INC. AND IRONWORKERS DISTRICT COUNCIL OF ONTARIO AND B.S.O.I.W., LOCAL 700; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1244(Aug.)

819

Evidence - Construction Industry - Related Employer - Sale of a Business - No one appearing for respondent companies at hearing - Act requiring respondent to adduce all material facts relevant to application, but not altering legal burden of proof - Where applicant union chooses to proceed in absence of respondents rather than enforce attendance, union must still adduce some evidence to support findings necessary to successful application - Absence of information particularly within knowledge of respondents should not stand in way of success - Board assessing evidence accordingly - Declaration issuing

DELTA ELECTRIC EASTERN LIMITED, DELTA ELECTRICAL & MECHANICAL INC., DELTA ELECTRICAL & MECHANICAL LIMITED AND DELTA ELECTRIC LTD.; RE I.B.E.W., LOCAL 353(Dec.)

1259

Evidence - Discharge - Health and Safety - Witness - Employee discharged after discussing petition for a lunchroom with another employee - Board permitting employee to recall employer's witness - Employee discharged for reasons unrelated to health and safety - Majority unwilling to exercise discretion under section 24(7) of *Occupational Health and Safety Act* to modify penalty - Exercise of discretion under Section 24(7) inappropriate where no connection between health and safety concern expressed by employee and employer conduct or actions - Complaint dismissed

NATIONAL PLASTIC PROFILES INC.; RE STEVE MIKE SZEGHALMI (Oct.)

1078

Evidence - Duty of Fair Representation - Practice and Procedure - Complainants providing insufficient particulars - Board reviewing legal authority and labour relations rationale for provision of sufficient particulars in advance - Board explaining what particulars are and providing examples - Board distinguishing particulars from evidence - Board declining to dismiss

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BERTO'S RESTAURANT INC.; RE MARJORIE MEIGHAN; RE HOTEL MOTEL AND RESTAURANT EMPLOYEES UNION, LOCAL 442.....	17
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SIDING I.P.E. LIMITED; RE C.J.A., LOCAL 27	1097
Evidence - Membership Evidence - Employer entitled to ask questions with respect to union organizing campaign so long as confidentiality of employee choice on union membership not breached	
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hear such evidence as to do so would undermine the settlement process and the impartiality of Board officers

LUME MASONRY LTD.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GROUP OF EMPLOYEES; RE LUME CONSTRUCTION LIMITED.....(Aug.)

860

Evidence - Practice and Procedure - Witness - objections to conduct in inquiry before labour relations officer to be dealt with in accordance with practice note #4 - questions put to witness at inquiry not improper merely because they raise an issue of credibility

MAPLE ENGINEERING & CONSTRUCTION CANADA LTD.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE C.L.A.C.....(Nov.)

1142

Evidence - Termination - Petition - Inadequate first hand evidence of origination and preparation of petition - Gaps in evidence of custody - Incomplete evidence on circulation of petition and circumstances surrounding each signature - Evidence inconsistent - Board unable to accept petition as voluntary expression of employee wishes - Application dismissed

HULLY GULLY LONDON LTD.; RE RONALD GARY EMMONS; RE R.W.D.S.U., AFL, CIO, CLC

(Feb.)

Final Offer Vote - Bargaining Unit - Collective Agreement - Duty to Bargain in Good Faith - Strike - Unfair Labour Practice - Voter eligibility in final offer vote limited under circumstances to persons who were employees in bargaining unit at time strike began, except where connection to workplace severed prior to date of vote - Injured employee with no expectation of returning to bargaining unit not eligible to vote - Good faith bargaining obligation not requiring employer to discuss new information with trade union prior to requesting or participating in final offer vote - Board refraining from exercising discretion to grant unlawful strike declaration or direction - Trade union refusal to execute collective agreement constituting under circumstances breach of duty to bargain in good faith - Board directing union to bargain in good faith, submit to vote results, and execute collective agreement reflecting final offer accepted in vote

MCINTYRE, WILF, FRED MIRON, ROLAND FRAYNE, NIELS HUSMAN, LARRY DUHAIME AND I.W.A. - CANADA, LOCAL 2693; RE PROSPER BRIZZARD, RICHARD BRIZZARD, ROBERT CASSON, RICHARD KOSKI, DAVID JAGGARD, MANFRED KRAUSE, ROBERT KRAUSE, DAVID ROSS, AULIUS TIITTO, DARRELL WESTOVER, RAYNARD JACOBSON, BRUCE NORDSTROM AND LARRY JAGGARD; RE GRAVEL AND LAKE SERVICES LIMITED (Oct.)

1052

Final Offer Vote - Damages - Duty to Bargain in Good Faith - Interference in Trade Unions - Judicial Review - Lockout - Remedies - Stay - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees -

Employer bringing application for a stay of the Board's decision pending the hearing of its application for judicial review - Stay application dismissed by High Court

PLAZA FIBREGLAS MANUFACTURING LTD., PLAZA ELECTROPLATING LTD., CITCOR MANUFACTURING LTD. AND SABINA CITRON; RE ONTARIO LABOUR RELATIONS BOARD AND U.S.W.A.....(June)

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Final Offer Vote - Damages - Duty to Bargain in Good Faith - Interference in Trade Unions - Lockout - Remedies - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches, to pay union's negotiating costs, to return work to original company and make no further movement without disclosure to union, to provide union with names and addresses of bargaining unit employees as of lockout date, and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees

PLAZA FIBERGLAS MANUFACTURING LIMITED AND PLAZA ELECTROPLATING LTD., CITCOR MANUFACTURING LTD., AND SABINA CITRON; RE U.S.W.A.....(Feb.)

192

Final Offer Vote - Strike - Employer alleging union engaging in illegal strike by refusing to sign collective agreement reflecting employer's "final offer" - Union challenging Board's jurisdiction to deal with voter eligibility issues arising out of final offer votes - Union arguing only Minister has this authority - Board asserting jurisdiction - Act silent on disposition of final offer vote issues - Two-step approach of Minister determining vote and Board then determining complaint under Act would result in multiple proceedings and delay - Minister having no adjudicative powers under Act - Board jurisdiction consistent with its adjudicative powers and general structure of Act

GRAVEL AND LAKE SERVICES LIMITED; RE ROLAND FRAYNE, NEILS HUSMAN AND LARRY DUHAIME; RE PROSPER BRIZZARD, RICHARD BRIZZARD, ROBERT CASSON, RICHARD KOSKI, DAVID JAGGARD, MANFRED KRAUSE, ROBERT KRAUSE; DAVID ROSS, AULIUS TIITTO, DARRELL WESTOVER, RAYNARD JACOBSON, BRUCE NORDSTROM AND LARRY JAGGARD; RE WILF MCINTYRE, FRED MIRON AND I.W.A. - CANADA, LOCAL 2693.....(Mar.)

262

First Contract Arbitration - Adjournment - Collective Agreement - Interest Arbitration - Judicial Review - Practice and Procedure - Stay - Employer and termination applicant requesting that Board adjourn its hearings to arbitrate the settlement of a first collective agreement pending a stay and judicial review application in the courts - Adjournment denied - Board proceeding with hearings in absence of employer - Board amending significant number of articles in union's proposed collective agreement to reflect what should reasonably be contained in a first collective agreement - Board deleting paid education leave, COLA and pension plan provisions

VENTURE INDUSTRIES CANADA, LTD.; RE C.A.W.(July)

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First Contract Arbitration - Collective Agreement - Interest Arbitration - Employer in business of

preparing and packaging soils and fertilizers - Board determining wage schedule in first collective agreement - Employer's proposal for a two-tier wage structure inappropriate		
HILLVIEW FARMS LIMITED; RE U.F.C.W., LOCAL 1000A.....	(May)	564
First Contract Arbitration - Employer insisting on company philosophy clause with anti-union origin - Employer insisting union agree not to prohibit subcontracting in agreements with other employers - Employer adopting unreasonable bargaining position - First contract arbitration directed		
VENTURE INDUSTRIES CANADA, LTD.; RE C.A.W.(Aug.)		904
First Contract Arbitration - Employer insisting on two-tiered benefits package - Future hires in bargaining unit to receive less than longstanding benefits package enjoyed by unorganized employees - Employer position designed to send message organizing would result in loss of benefits - Position designed to penalize new hires only because union represents them - Position analogous to threatening employees with lay-off of plant shutdown for exercising rights under Act - Position uncompromising and without reasonable justification - First contract arbitration ordered		
MACMILLAN BLOEDEL BUILDING MATERIALS LIMITED; RE LOCAL 2693, IWA-CANADA	(Jan.)	59
First Contract Arbitration - Employer's proposal to take three employees out of bargaining unit and initial refusal to provide negotiating data indicating refusal to recognize union's bargaining authority - Employer's wage proposal of only one wage rate at a level of the lowest rate being paid to employees constituting uncompromising proposal without reasonable justification - Process of bargaining found to be unsuccessful even though only two bargaining sessions held - Inexperience of employers' negotiator not a mitigating factor - Board directing the settlement of a first collective agreement by arbitration		
PEACOCK LUMBER LIMITED; RE R.W.D.S.U., AFL:CIO:CLC:	(May)	584
First Contract Arbitration - Evidence - Practice and Procedure - Board not admitting pleadings from unfair labour practice complaint involving same parties - First Contract arbitration concerned with fair and reasonable terms and not conduct of parties during negotiations or certification - Award should reflect terms parties would have reached had bargaining not broken down - Board assuming parties would make agreement comparable to others in same industry and geographic area - Board having regard to previous bargaining relationship and collective agreements between employer and another union - Board having regard to market conditions in unionized sector of industry in geographic area competition - Award making allowances for fact employer must compete with non-unionized operations - Award including retroactivity but not signing bonus		
CANADA BUILDING MATERIALS COMPANY; RE TEAMSTERS UNION, LOCAL NO. 880	(Oct.)	1012
First Contract Arbitration - Interference in Trade Unions - Intimidation and Coercion - Lockout - Remedies - Unfair Labour Practice - Employer recalling employees after first contract arbitration direction by Board - Employees subsequently laid off for "lack of work" - Layoff followed by employer approach to two members of union negotiating team with concessionary package - Employer use of layoff as lever to induce employees to agree to concessions constituting illegal lockout where first contract arbitration direction made - Layoff constituting intimidation - Approaches to negotiating team members constituting direct bargaining and interference in trade union - Employer bankruptcy not improperly motivated - Employer personally and corporately liable for damages		
BOURQUE CONSUMER ELECTRONICS SERVICE INC. AND MR. PIERRE BOURQUE; RE C.A.W. AND ITS LOCAL 673	(Oct.)	999

First Contract Arbitration - Judicial Review - Practice and Procedure - Stay - Termination - Application for termination of union's bargaining rights filed before panel hearing first contract application issued its decision - Termination application not reaching panel before panel issued its decision directing the settlement of a first collective agreement by arbitration - Board determining appropriate order in which the two applications to be considered in the context of a reconsideration application - Sound labour relations considerations leading Board to consider first contract application first - Termination application dismissed - Termination applicant requesting leave of High Court to bring an application for judicial review in the High Court, an order setting aside Board decisions and a stay of the Board's further hearings to settle the first collective agreement - High Court denying leave - Judicial review application transferred to Divisional Court - Request for stay denied

VENTURE INDUSTRIES CANADA LIMITED, C.A.W. AND ONTARIO LABOUR RELATIONS BOARD; RE RANDY BURKE (June)

749

First Contract Arbitration - Parties - "Where the parties are unable to effect a first collective agreement" refers to union and employer parties to present application - First contract arbitration not precluded by an earlier collective agreement covering the same employees where the parties to that agreement were the employer and an employee association later displaced by the applicant union - Given the magnitude of concessions it was seeking, the employer's failure to provide financial data during bargaining was a failure to make reasonable or expeditious efforts to make a collective agreement - In the circumstances, this failure was also an uncompromising bargaining position without reasonable justification - First contract arbitration directed

BOURQUE CONSUMER ELECTRONICS SERVICE INC.; RE C.A.W. AND ITS LOCAL 673 (Aug.)

821

First Contract Arbitration - Practice and Procedure - Termination - Application for termination of union's bargaining rights filed before panel hearing first contract application issued its decision - Termination application not reaching panel before panel issued its decision directing the settlement of a first collective agreement by arbitration - Board determining appropriate order in which the two applications to be considered in the context of a reconsideration application - Sound labour relations considerations leading Board to consider first contract application first - Termination application dismissed

VENTURE INDUSTRIES CANADA, LTD.; RE C.A.W.; RE RANDY BURKE (May)

625

First Contract Arbitration - Practice and Procedure - Termination - Board exercising discretion to determine order in which first contract arbitration application and termination application were to be considered - First contract application was filed first, proceedings adjourned for continuing negotiations, then brought back on after filing of termination application - Board directing first contract application to be dealt with first - Bumping first contract arbitration behind termination would provide parties in similar circumstances with little incentive to continue negotiations - Parties having already had three days of hearing with associated expense of first contract issue

NORTHFIELD METAL PRODUCTS LTD.; RE G.M.P.; RE DAVE MIKEL AND GROUP OF EMPLOYEES; RE G.M.P. (AFL-CIO-CLC) (Mar.)

302

Fraud - Certification - Certification Where Act Contravened - Reconsideration - Employer requesting reconsideration of certification on grounds union failed to inform Board of material change in circumstances relevant to exercise of Board's discretion - Local union executive approved merger with other locals while certification application before Board - Members not notified or attending merger meeting - Union treating members as "members awaiting contract coverage" without full rights of active members, including right to vote on merger resolution - Employer alleging union's failure to inform Board of circumstances sur-

rounding merger resolution constituting misrepresentation and fraud - Majority rejecting employer allegations - Information not material change or relevant to exercise of Board's discretion - Local union continuing in existence - Union members within statutory definition of term - Application dismissed

KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 206; RE GROUP OF EMPLOYEES (Feb.)

169

Fraud - Certification - Evidence - Petition - Practice and Procedure - Reconsideration - Employee seeking reconsideration of Board's decision certifying union on basis that application tainted by fraud - Assertion that another employee circulated a petition but never intended to file it with the Board - Further allegation that this employee was acting as an agent for the union with respect to his petition activity - Union making non-suit application and electing to call no evidence - Reconsideration application dismissed - Circulator of the petition was not an agent or an officer of the union - No evidence as to why petition was not filed - Evidence consistent with theory that employees change their minds concerning support for a union - Objecting employees bound by the actions of their representative after selecting person to represent their interests in opposing the union

RUSSELL H. STEWART CONSTRUCTION COMPANY LIMITED; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES..... (Apr.)

464

Fraud - Certification - Practice and Procedure - Reconsideration - Allegation that employee who circulated petition was union agent with no intention to file petition or appear before Board - Allegation, if true, may constitute fraud and abuse of Board's process - Matter set down for hearing

RUSSELL H. STEWART CONSTRUCTION COMPANY LIMITED; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES..... (Jan.)

79

Health and Safety - Arbitration - Practice and Procedure - Complainant alleging that respondent failed to comply with Board order - Board treating complainant's letter as notification of a failure to comply - Board to file copy of decision with Supreme Court

RAMJIT, BO; RE MANUEL PUCHE..... (Oct.)

1090

Health and Safety - Complainant alleging dismissal for exercising rights under *Occupational Health and Safety Act* - Complainant using various statutory provisions to pressure employer to shorten shift - Complainant dismissed for refusal to work assigned shift - Complaint dismissed

TORONTO TRANSIT COMMISSION WHEEL TRANS DEPARTMENT; RE EVERETTE CHAPPELLE

90

Health and Safety - Construction Industry - Construction Industry Grievance - Employer arranging health and safety training session for Workplace Hazardous Materials Information System on Friday afternoon - Session held at union hall and open to union members only - Union business representatives attending - Employer and union cooperating in providing refreshments - *Occupational Health and Safety Act* requiring employer to provide instructions but silent on payment - Employer failing to inform employees at meeting that attendance voluntary and unpaid - Employees entitled to wages and benefits for time at session

ROSMAR DRYWALL & ACOUSTICS LIMITED; RE C.J.A., LOCAL 785..... (Feb.)

214

Health and Safety - Construction Industry - Picketing - Remedies - Strike - Board asked to declare that respondent employees had engaged in an unlawful strike by refusing to cross picket line established by another union - Argued that employees did not cross picket line because they believed it would be dangerous to do so - Picket line tension runs high but actual violence is rare - Board finding nothing in facts which would justify employees'

refusal - Declaration of unlawful strike and direction to cease engaging in unlawful activity issuing		
HORTON CBI, LIMITED; RE LEO E. EVANS, JOE L. DA SILVA, TERRANCE R. MCGUIRE, AND SANFORD JONES; RE B.B.F., LOCAL 128	(June)	648
Health and Safety - Construction Industry - Strike - Unfair Labour Practice - Employer requiring all employees to wear bellyhooks, whether or not needed in work - Employees believing bellyhooks unsafe and refusing to wear as way of demonstrating refusal to use under any circumstances - Employer refusing to assign work to employees refusing to wear bellyhooks - Employer seeking illegal strike declaration and damages - Employees alleging reprisal contrary to <i>Occupational Health and Safety Act</i> - Refusal not justified under <i>Occupational Health and Safety Act</i> since mere wearing of bellyhooks not alleged to endanger - No refusal to work since no work assigned - Complaints and application dismissed		
GILBERT STEEL LIMITED; RE B.S.O.I.W. LOCAL 721, GEORGE JONCAS, ALFIE THOMAS, AND AARON MURPHY ON THEIR OWN BEHALF AND ON BEHALF OF THE RESPONDENT UNION; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, ONTARIO HYDRO RE B.S.O.I.W., LOCAL 721, ON BEHALF OF ITS REINFORCING RODMEN NAMED IN SCHEDULE "B" TO THE COMPLAINT; RE B.S.O.I.W., LOCAL 721, GEORGE JONCAS, ALFIE THOMAS, JOHN DONALDSON AND AARON MURPHY	(Feb.)	136
Health and Safety - Damages - Discharge - Remedies - Complainant was suddenly dismissed for tardiness after speaking to a Health and Safety Inspector - Complainant had a genuine tardiness problem but had not hitherto been disciplined or warned of discharge - Circumstances leading to inference of employer "anti-safety animus" - Complainant seeking monetary compensation only - Complainant was in jeopardy of discharge for tardiness and was already looking for other work - Remedy not meant as winfall - Board awarding \$4,500 damages		
RAMJIT, BO; RE MANUEL PUCHE.....	(Aug.)	874
Health and Safety - Discharge - Complainant discharged for objecting to standing near sandblasting where sand was irritating his face and eyes - Board ordering \$2,100 compensation for wage loss		
VILLAGE POOL & SPA; RE TIM V. PAULEY	(Sept.)	987
Health and Safety - Discharge - Employee discharged shortly after refusing to continue paint inventory work - Employee suffering from dizziness and headaches - Employer not providing convincing explanation for timing of discharge - Employer not discharging reverse onus - Employer in breach of Act		
TRELFFORD AUTOMOBILE LIMITED, ROBERT TRELFFORD; RE DEBORAH BROWN	(Nov.)	1155
Health and Safety - Discharge - Evidence - Witness - Employee discharged after discussing petition for a lunchroom with another employee - Board permitting employee to recall employer's witness - Employee discharged for reasons unrelated to health and safety - Majority unwilling to exercise discretion under section 24(7) of <i>Occupational Health and Safety Act</i> to modify penalty - Exercise of discretion under Section 24(7) inappropriate where no connection between health and safety concern expressed by employee and employer conduct or actions - Complaint dismissed		
NATIONAL PLASTIC PROFILES INC.; RE STEVE MIKE SZEGHALMI	(Oct.)	1078
Health and Safety - Discharge - Remedies - Occupational health nurse fired after refusing to return to the employer the keys to the filing cabinet holding employee health records - Whether discharge was for insubordination or acting in compliance with OHSA in protect-		

ing the confidentiality of employee health records - Nurse found to be genuinely motivated by a health and safety concern - Board not making positive finding that there is a duty under OHSA with which nurse was complying - Board finding it appropriate to review penalty imposed whether OHSA violated or not - All record of discharge to be removed from file - Written warning substituted for discharge	
BILT-RITE UPHOLSTERING CO. LTD.; RE JUDY BARRY	(July) 755
Health and Safety - Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Employer not proper party to fair representation complaint involving discharge, where justness of discharge determined in earlier Board proceeding under Section 24 of the <i>Occupational Health and Safety Act</i>	
CHAPELLE, EVERETTE; RE A.T.U., LOCAL 113; RE TORONTO TRANSIT COMMISSION WHEEL TRANS DEPARTMENT.....	(Dec.) 1238
Health and Safety - Employee asked by supervisor to resign lead hand position - Employee had criticized supervisor's health and safety practices at a meeting shortly before - Supervisor was aware of criticism - Employer failing to rebut inference of anti-safety animus - Board directing reinstatement in lead hand position and compensation	
CROTHERS LTD.; RE DOMENICO PAOLO	(Nov.) 1129
Health and Safety - Employee citing secondhand tobacco smoke in work refusal - Health and safety not real reason for refusal - Employer discipline not improper under circumstances	
BOEING CANADA/DEHAVILLAND DIVISION; RE JILL BETTES; RE C.A.W.....	(Dec.) 1213
Health and Safety - Employee refusing for safety reasons supervisor's order to put more gravel in wheelbarrow - Employee sent home - Board ordering compensation for lost wages	
BOSTON INSULATED WIRE AND CABLE CO.; RE TERRY BEARMAN & U.E., LOCAL 520	(Dec.) 1235
Health and Safety - Employer believed employee was spending and excessive amount of time on health and safety activities - Belief was a part of employer motivation in deciding to include employee in a layoff - Board ordering reinstatement and compensation	
BLENKHORN & SAWLE LTD.; RE DOUG MCFADDEN.....	(Sept.) 921
Health and Safety - Evidence - Complainant alleging dismissal for compliance with <i>Occupational Health and Safety Act</i> - Complainant striking co-workers' hand with hammer - Employer treating as "culminating incident" - Board not prepared to assess merits of discipline in previous incidents - Complainant free to lead evidence that previous discipline grieved - No evidence complainant's involvement with safety matters played any part in employers' decision to dismiss - Complaint dismissed	
W.C. WOOD CO. LTD.; RE WILLIAM JAMES KERR	(Jan.) 105
Hospital Labour Disputes Arbitration Act - Conciliation - Reference - Sale of a Business - Board of arbitration constituted - Business sold - New employer requesting Minister to appoint a conciliation officer - Whether Minister can appoint a conciliation officer even though an arbitration board has been established under HLDAA - Sale of a business provision does not preserve all the rights of a union as they stood at the time of sale - Board advising Minister that he is required to appoint a conciliation officer	
TRILLIUM MANOR HOME FOR THE AGED, CORPORATION OF THE COUNTY OF SIMCOE; RE O.N.A.....	(Apr.) 472
Interest Arbitration - Adjournment - Collective Agreement - First Contract Arbitration - Judicial Review - Practice and Procedure - Stay - Employer and termination applicant requesting	

that Board adjourn its hearings to arbitrate the settlement of a first collective agreement pending a stay and judicial review application in the courts - Adjournment denied - Board proceeding with hearings in absence of employer - Board amending significant number of articles in union's proposed collective agreement to reflect what should reasonably be contained in a first collective agreement - Board deleting paid education leave, COLA and pension plan provisions

VENTURE INDUSTRIES CANADA, LTD.; RE C.A.W. (July)

809

Interest Arbitration - Collective Agreement - First Contract Arbitration - Employer in business of preparing and packaging soils and fertilizers - Board determining wage schedule in first collective agreement - Employer's proposal for a two-tier wage structure inappropriate

HILLVIEW FARMS LIMITED; RE U.F.C.W., LOCAL 1000A (May)

564

Interference in Trade Union - Certification Where Act Contravened - Intimidation and Coercion

- Unfair Labour Practice - Employer firing four union supporters and failing to retain another union supporter for training of replacement - Events occurring shortly after start of organizing campaign - Employees so intimidated by employer conduct that usual remedies unlikely to be effect - Vote unlikely to reveal true wishes - Union filing cards for approximately 25% of bargaining unit - Employer actions severe and at start of campaign - Substantial additional union support likely but for employer actions - Union having adequate support for collective bargaining - Certificate issuing

NEPEAN BUS LINES INC.; RE TEAMSTERS' UNION, LOCAL 91; RE DAVE LONEY (Mar.)

295

Interference in Trade Unions - Bargaining Rights - Related Employer - Remedies - Unfair Labour Practice - Complaint involving the transfer of work from Condor to Progressive and the resultant layoff of half the bargaining unit, the failure of Progressive to hire laid off Condor employees and letters to laid off employees - Condor bound by collective agreement with union with scope clause limited to Toronto - Progressive outside that geographic scope - Employer not breaching Act by not bargaining enhanced severance package with the union given the silence of the collective agreement on issue of severance entitlement and requirements of *Employment Standards Act* - No breach in failure to hire laid off Condor employees - Board declaring Condor and Progressive one employer but declining to exercise its discretion to extend scope clause in Condor's collective agreement to Progressive

PROGRESSIVE PACKAGING LIMITED, CONDOR LAMINATIONS, INNOPAC INC.; RE TORONTO TYPOGRAPHICAL UNION, NUMBER 91, PRINTING PUBLISHING AND MEDIA WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF NORTH AMERICA (May)

592

Interference in Trade Unions - Build-Up - Certification - Intimidation and Coercion - Membership Evidence - Petition - Representation Vote - Unfair Labour Practice - Whether Board should order a vote to be conducted in the future - Employer having no firm plans for build-up as of the application date nor was build-up of the magnitude that would lead the Board to order and defer a vote - Employer alleging that misconduct by employee organizing committee made union's membership evidence unreliable - Misconduct alleged to have occurred including intimidation of petitioners - Conduct of employee organizers not leading Board to order vote - Employer found to have breached Act by questioning employees about their support for the union - Certificate issuing

GSW INC. C.O.B. AS GSW HEATING PRODUCTS DIVISION; RE U.S.W.A.; RE GROUP OF EMPLOYEES (May)

535

Interference in Trade Unions - Certification - Certification Where Act Contravened - Discharge - Discharge for Union Activities - Unfair Labour Practice - Union supporters discharged dur-

ing organizing campaign - Union having sufficient membership support for representation vote - Discharges likely to have had chilling effect - Vote not likely to show true wishes - Certificate issuing - Reinstatement, compensation, and posting orders made

REPLA LIMITED; RE C.J.A. (Dec.)

1319

Interference in Trade Unions - Certification - Certification Where Act Contravened - Intimidation and Coercion - Unfair Labour Practice - Employer implementing planned layoff two days early after learning about organizing campaign - Employees would reasonably perceive events as connected - Union filing cards for about thirty percent of bargaining unit - No reason to discount union support among laid off employees - Employees on temporary layoff having ongoing interest or connection with workplace - Certificate issuing

ROMATT CUSTOM WOODWORK INC.; RE C.J.A., LOCAL 27 (Aug.)

894

Interference in Trade Unions - Certification Where Act Contravened - Discharge - Unfair Labour Practice - Employer making layoff prediction in bulletin to employees - Bulletin distributed during union organizing campaign - Key union organizer terminated - Refusal to hire person who might have become a union supporter - Termination found to be a breach of the Act - Union certified without vote pursuant to s.8

DAVID CHAPMAN'S ICECREAM LIMITED; RE U.F.C.W., LOCAL 175 (July)

778

Interference in Trade Unions - Change in Working Conditions - Intimidation and Coercion - Unfair Labour Practice - Employer dismissing employee involved in organizing campaign and sitting on bargaining committee - Dismissal occurring during "statutory freeze" period - Employee dismissed for irregularities in credit card vouchers - Board satisfied on balance reasons given by employer were only reasons for dismissal - Complaint dismissed

HY'S STEAK HOUSE, HYDON HOLDINGS LTD. C.O.B. AS; RE R.W.D.S.U., AFL-CIO-CLC

(Feb.) 163

Interference in Trade Unions - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Judicial Review - Lockout - Remedies - Stay - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees - Employer bringing application for a stay of the Board's decision pending the hearing of its application for judicial review - Stay application dismissed by High Court

PLAZA FIBREGLAS MANUFACTURING LTD., PLAZA ELECTROPLATING LTD., CITCOR MANUFACTURING LTD. AND SABINA CITRON; RE ONTARIO LABOUR RELATIONS BOARD AND U.S.W.A..... (June)

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Interference in Trade Unions - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Lockout - Remedies - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout

deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches, to pay union's negotiating costs, to return work to original company and make no further movement without disclosure to union, to provide union with names and addresses of bargaining unit employees as of lockout date, and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees

PLAZA FIBERGLAS MANUFACTURING LIMITED AND PLAZA ELECTRO-PLATING LTD., CITCOR MANUFACTURING LTD., AND SABINA CITRON; RE U.S.W.A..... (Feb.)

192

Interference in Trade Unions - Discharge - Discharge for Union Activity - Unfair Labour Practice - Employee discharged after minor misconduct - Employee had unsatisfactory performance record and knew his employment was in jeopardy - Employer knew employee had been involved in organizing campaign and might be on negotiating committee - While the appearance that a discharge is arbitrary or harsh may undermine an employer's assertion that union activity played no part in its decision, the appropriateness of discharge in the circumstances is not the issue before the Board - Evidence consistent with conclusion that termination was in no way caused by anti-union animus - Complaint dismissed

SUDBURY YOUTH SERVICES INC.; RE O.P.S.E.U. (Dec.)

1339

Interference in Trade Unions - Evidence - Intimidation and Coercion - Practice and Procedure - Unfair Labour Practice - Complainant denied installation work after returning from vacation - Board reviewing effect of reverse onus of proof - Board reviewing relevant factors in determining existence of anti-union animus - Reinstatement ordered with compensation for damages and workplace posting

SIDING I.P.E. LIMITED; RE C.J.A., LOCAL 27 (Oct.)

1097

Interference in Trade Unions - First Contract Arbitration - Intimidation and Coercion - Lockout - Remedies - Unfair Labour Practice - Employer recalling employees after first contract arbitration direction by Board - Employees subsequently laid off for "lack of work" - Layoff followed by employer approach to two members of union negotiating team with concessionary package - Employer use of layoff as lever to induce employees to agree to concessions constituting illegal lockout where first contract arbitration direction made - Layoff constituting intimidation - Approaches to negotiating team members constituting direct bargaining and interference in trade union - Employer bankruptcy not improperly motivated - Employer personally and corporately liable for damages

BOURQUE CONSUMER ELECTRONICS SERVICE INC. AND MR. PIERRE BOURQUE; RE C.A.W. AND ITS LOCAL 673

(Oct.)

999

Intimidation and Coercion - Build-Up - Certification - Interference in Trade Unions - Membership Evidence - Petition - Representation Vote - Unfair Labour Practice - Whether Board should order a vote to be conducted in the future - Employer having no firm plans for build-up as of the application date nor was build-up of the magnitude that would lead the Board to order and defer a vote - Employer alleging that misconduct by employee organizing committee made union's membership evidence unreliable - Misconduct alleged to have occurred including intimidation of petitioners - Conduct of employee organizers not leading

Board to order vote - Employer found to have breached Act by questioning employees about their support for the union - Certificate issuing	
GSW INC. C.O.B. AS GSW HEATING PRODUCTS DIVISION; RE U.S.W.A.; RE GROUP OF EMPLOYEES	(May) 535
Intimidation and Coercion - Certification - Certification Where Act Contravened - Interference in Trade Unions - Unfair Labour Practice - Employer implementing planned layoff two days early after learning about organizing campaign - Employees would reasonably perceive events as connected - Union filing cards for about thirty percent of bargaining unit - No reason to discount union support among laid off employees - Employees on temporary layoff having ongoing interest or connection with workplace - Certificate issuing	
ROMATT CUSTOM WOODWORK INC.; RE C.J.A., LOCAL 27	(Aug.) 894
Intimidation and Coercion - Certification - Construction Industry - Membership Evidence - Unfair Labour Practice - Employer alleging that union's membership evidence was obtained in violation of Act - Union representative making statements to employees that if they did not sign union cards they would be removed from work site - Board finding that union was only attempting to enforce its collective agreement with the general contractor - No improper conduct - Certificates issuing	
CUNEO INTERIORS; RE C.J.A., LOCAL 27.....	(May) 499
Intimidation and Coercion - Certification - Membership Evidence - Employer arguing that union "bought" memberships by providing valuable merchandise to employees who signed membership cards and paid \$1.00 - Employer arguing that vote required to remove "cloud" or that all cards should be disregarded - Board determining that such allegations must be made in a timely and particularized manner - Giving out of merchandise not condition of signing a card - Union's conduct did not cross line from salesmanship to buying of memberships - Certificate issuing	
JOHNSON CONTROLS LTD.; RE C.A.W.; RE GROUP OF EMPLOYEES	(June) 651
Intimidation and Coercion - Certification - Representation Vote - Unfair Labour Practice - Intimidatory statements made by one employee to another during an organizing campaign - Statements not made by a collector or on behalf of the union - Peer pressure during organizing drive not relevant to reliability of membership evidence - Board will not order a representation vote where a statement about union dues is made by a rank and file employee - Certificate issuing	
NATIONAL NEWS COMPANY LIMITED; RE TEAMSTERS UNION, LOCAL 91; RE GROUP OF EMPLOYEES	(Aug.) 870
Intimidation and Coercion - Certification Where Act Contravened - Interference in Trade Union - Unfair Labour Practice - Employer firing four union supporters and failing to retain another union supporter for training of replacement - Events occurring shortly after start of organizing campaign - Employees so intimidated by employer conduct that usual remedies unlikely to be effect - Vote unlikely to reveal true wishes - Union filing cards for approximately 25% of bargaining unit - Employer actions severe and at start of campaign - Substantial additional union support likely but for employer actions - Union having adequate support for collective bargaining - Certificate issuing	
NEPEAN BUS LINES INC.; RE TEAMSTERS' UNION, LOCAL 91; RE DAVE LONEY	(Mar.) 295
Intimidation and Coercion - Change in Working Conditions - Interference in Trade Unions - Unfair Labour Practice - Employer dismissing employee involved in organizing campaign and sitting on bargaining committee - Dismissal occurring during "statutory freeze" period -	

Employee dismissed for irregularities in credit card vouchers - Board satisfied on balance reasons given by employer were only reasons for dismissal - Complaint dismissed	
HY'S STEAK HOUSE, HYDON HOLDINGS LTD. C.O.B. AS; RE R.W.D.S.U., AFL-CIO-CLC	163
Intimidation and Coercion - Evidence - Interference in Trade Unions - Practice and Procedure - Unfair Labour Practice - Complainant denied installation work after returning from vacation - Board reviewing effect of reverse onus of proof - Board reviewing relevant factors in determining existence of anti-union animus - Reinstatement ordered with compensation for damages and workplace posting	
SIDING I.P.E. LIMITED; RE C.J.A., LOCAL 27	(Oct.) 1097
Intimidation and Coercion - First Contract Arbitration - Interference in Trade Unions - Lockout - Remedies - Unfair Labour Practice - Employer recalling employees after first contract arbitration direction by Board - Employees subsequently laid off for "lack of work" - Layoff followed by employer approach to two members of union negotiating team with concessionary package - Employer use of layoff as lever to induce employees to agree to concessions constituting illegal lockout where first contract arbitration direction made - Layoff constituting intimidation - Approaches to negotiating team members constituting direct bargaining and interference in trade union - Employer bankruptcy not improperly motivated - Employer personally and corporately liable for damages	
BOURQUE CONSUMER ELECTRONICS SERVICE INC. AND MR. PIERRE BOURQUE; RE C.A.W. AND ITS LOCAL 673	(Oct.) 999
Intimidation and Coercion - Strike - Unfair Labour Practice - Collective agreement permitting inspectors to maintain union membership and departmental seniority rights on return to bargaining unit, provided they maintained union membership - Inspectors threatened with expulsion by union if they performed bargaining unit work during strike - Expulsions carried out - Employer arguing union counselled illegal strike and penalized inspectors for failure to participate in illegal strike - Refusal by inspectors to work would not have been "strike" by "employees" within meaning of Act - Illegal strike provisions of Act inapplicable - No intimidation or coercion - Act giving only limited rights to managerial personnel - Statutory provision making agreement binding on employer and union not creating rights under Act for managerial personnel - Complaint dismissed	
TORONTO TRANSIT COMMISSION; RE A.T.U., LOCAL 113; RE WILLIAM L. FRANCO ET AL.....	(Dec.) 1346
Judicial Review - Adjournment - Collective Agreement - First Contract Arbitration - Interest Arbitration - Practice and Procedure - Stay - Employer and termination applicant requesting that Board adjourn its hearings to arbitrate the settlement of a first collective agreement pending a stay and judicial review application in the courts - Adjournment denied - Board proceeding with hearings in absence of employer - Board amending significant number of articles in union's proposed collective agreement to reflect what should reasonably be contained in a first collective agreement - Board deleting paid education leave, COLA and pension plan provisions	
VENTURE INDUSTRIES CANADA, LTD.; RE C.A.W.	(July) 809
Judicial Review - Adjournment - Construction Industry - Construction Industry Grievance - Natural Justice - Practice and Procedure - Grievance filed by union alleging employer breached collective agreement by not hiring through hiring hall - Employer asking by letter for adjournment - Employer not appearing at hearing - Employer found to have breached collective agreement - Board not granting adjournments unless on consent of parties - Otherwise request must be made before panel on hearing date - Employer's reconsideration request denied - Employer bringing application for judicial review on the ground that the	

Board failed to comply with the rules of natural justice by proceeding with hearing in employer's absence - Judicial review dismissed by Divisional Court

TODD RAMSAY INTERIORS INC. AND JAMES R. TODD; RE C.J.A., LOCAL 93 AND THE ONTARIO LABOUR RELATIONS BOARD.....(June)

748

Judicial Review - Adjournment - Evidence - Jurisdictional Dispute - Parties - Practice and Procedure - Demolition association requesting permission to intervene and asking for an adjournment - Association had not filed an intervention, attended the pre-hearing conference, or retained counsel - Board denying adjournment - Merits panel to decide intervener status issue - Board limiting the evidence of area and employer practice it will admit - Evidence limited to the demolition of similar structures in an operating environment in the Province of Ontario - Statute compelling Board to inquire into work involving the same or similar type of structure in the same or similar type of environment - Union bringing application for judicial review on the grounds that, *inter alia*, the Board committed an error of natural justice and exceeded its jurisdiction in denying adjournment and limiting the scope of admissible evidence - Judicial review dismissed by Divisional Court

FOSTER WHEELER LIMITED AND THE METROPOLITAN TORONTO DEMOLITION CONTRACTORS ASSOCIATION, THE ONTARIO LABOUR RELATIONS BOARD AND B.B.F., LODGE 128; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL AND L.I.U.N.A., LOCAL 1089

(May)

Judicial Review - Adjournment - Practice and Procedure - Unfair Labour Practice - Board refusing to grant adjournment - Board acting fairly and reasonably - Application dismissed

BALANYK, ELIZABETH; RE THE GREATER NIAGARA GENERAL HOSPITAL, ONTARIO NURSES' ASSOCIATION, PATRICIA STUART, MARIANNE ORCUTT, AL WEIER, LIZ WOODS, AND O.L.R.B.(Nov.)

1198

Judicial Review - Arbitration - Duty of Fair Representation - Unfair Labour Practice - Bargaining unit members petitioning union to seek judicial review of arbitration decision - Union declining to seek review - Decision based solely on legal opinions on chances of success - Board applying same standard as to decision whether to arbitrate a grievance - Union not obliged to seek review even if review supported by unit members - Union not obliged to seek review where chance of success - Union entitled to refuse on merits in context of other considerations grounded in union's role as exclusive bargaining agent and collective bargaining - Union failure to explain reasons not breach of duty - Complaint dismissed

MCINTYRE, ROBERT; RE U.S.W.A., LOCAL 14045; RE ZALEV BROTHERS LIMITED.....(Feb.)

175

Judicial Review - Bargaining Unit - Certification - Construction Industry - Employee - Practice and Procedure - Board using tests in *Gilvesy* and *E & E Seegmiller* to determine whether persons should be included in the bargaining unit for purposes of "the count" - Employee included in unit because majority of his working time on date of application spent performing carpentry work - Certificates issuing - Employer bring application for judicial review on the grounds that, *inter alia*, the Board erred in considering the type of work performed by employees solely on the application date as opposed to a more representative period - Judicial review dismissed by Divisional Court

GENSPEC CONSTRUCTION INCORPORATED; RE C.J.A., LOCAL 27 AND ONTARIO LABOUR RELATIONS BOARD

(Apr.)

Judicial Review - Bargaining Unit - Certification - Dependent Contractor - Board not exceeding jurisdiction by issuing two certificates where application was for single "mixed" bargaining unit - Board correctly interpreting power to determine bargaining units - Board finding that

owner/drivers and drivers were “employees” not patently unreasonable - Application dismissed

HAMILTON YELLOW CAB LIMITED AND TRANSPORTATION UNLIMITED INC.; RE R.W.D.S.U., AFL-CIO-CLC AND O.L.R.B.....(Nov.)

1199

Judicial Review - Certification Where Act Contravened - Charter of Rights and Freedoms - Unfair Labour Practice - Layoff and intimidation of employees, and granting of wage increases constituting unfair labour practices - Letter to employees from president of company proper exercise of employer free speech - Reverse onus not contrary to Charter - Petition rejected - First contract legislation not altering section 8 jurisprudence - Certificate issuing - Unnecessary for union to call every grievor as a witness - All laid-off employees reinstated with compensation - Application for leave to appeal to the Court of Appeal dismissed

BAYDAK, DONNA ON BEHALF OF A GROUP OF 156 EMPLOYEES; RE O.L.R.B. AND U.F.C.W., LOCAL 206 AND KNOB HILL FARMS LIMITED

(Oct.)

Judicial Review - Charter of Rights - Construction Industry - Union Successor Status - Two locals of same union merged - Officers and members of one local opposed - Employer given status to intervene but not permitted to lead evidence on the consequences of the merger on its business operations - Merger in compliance with union constitution - Constitution not requiring membership approval - Divisional Court upholding Board decision - Failure to hold vote no infringement of Charter freedom of association - Board operated within limits of statutory discretion in making successor declaration

I.B.E.W., LOCAL 594, PATRICK WYSE AND MAURICE WALSH; RE I.B.E.W., LOCAL 586

(Dec.)

Judicial Review - Constitutional Law - Employer appealing decision of Divisional Court upholding Board's jurisdiction to issue certification order in commercial fishing industry - Federal constitutional jurisdiction over fisheries restricted to protection and preservation of fisheries as public resource - Federal constitutional jurisdiction not extending to business of commercial fishing - Labour relations of commercial fishing falling within provincial jurisdiction over property and civil rights - Board having jurisdiction to issue certification order - Appeal dismissed

GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION AND ONTARIO LABOUR RELATIONS BOARD; RE 504578 ONTARIO LIMITED, CARRYING ON BUSINESS AS MURRAY COLLARD FISHERIES, JIM FRASER FISHERIES LTD., H. TIESSEN FISHERIES LTD., FAVIGNANA FISHING CO. LIMITED, A. FIGLIOMENI & SONS LIMITED, FOUR BROTHERS FISHING CO., 538391 ONTARIO LIMITED OPERATING AS PERALTA FOODS, CP FISHERIES LTD., FAMILY FISHERY COMPANY LTD.....(Jan.)

117

Judicial Review - Construction Industry Grievance - Damages - Remedies - Board decision that failure to hold mark-up was a breach of the collective agreement was not patently unreasonable - Assessment of damages not unreasonable - Application dismissed

ONTARIO HYDRO AND ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO SHEET METAL WORKERS' AND U.A. AND THE O.L.R.B.....(Nov.)

1204

Judicial Review - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Lockout - Remedies - Stay - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining

directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees - Employer bringing application for a stay of the Board's decision pending the hearing of its application for judicial review - Stay application dismissed by High Court

PLAZA FIBREGLAS MANUFACTURING LTD., PLAZA ELECTROPLATING LTD., CITCOR MANUFACTURING LTD. AND SABINA CITRON; RE ONTARIO LABOUR RELATIONS BOARD AND U.S.W.A.....(June)

747

Judicial Review - First Contract Arbitration - Practice and Procedure - Stay - Termination - Application for termination of union's bargaining rights filed before panel hearing first contract application issued its decision - Termination application not reaching panel before panel issued its decision directing the settlement of a first collective agreement by arbitration - Board determining appropriate order in which the two applications to be considered in the context of a reconsideration application - Sound labour relations considerations leading Board to consider first contract application first - Termination application dismissed - Termination applicant requesting leave of High Court to bring an application for judicial review in the High Court, an order setting aside Board decisions and a stay of the Board's further hearings to settle the first collective agreement - High Court denying leave - Judicial review application transferred to Divisional Court - Request for stay denied

VENTURE INDUSTRIES CANADA LIMITED, C.A.W. AND ONTARIO LABOUR RELATIONS BOARD; RE RANDY BURKE.....(June)

749

Judicial Review - Natural Justice - Practice and Procedure - Supreme Court of Canada finding no breach of natural justice for Board panel hearing case to discuss policy implications of a draft decision at Full Board meeting - Rules of natural justice should not discourage administrative bodies from taking advantage of accumulated experience of their members - Board justified in taking appropriate measures to ensure conflicting results not inadvertently reached in similar cases - Full Board being formalized consultation process which cannot be used to force or induce decision makers to adopt positions with which they do not agree - Procedure not giving rise to reasonable apprehension of bias - Parties having right to respond to any new ground arising at Full Board on which they have not made representations - Appeal dismissed

CONSOLIDATED-BATHURST PACKAGING LTD.; RE I.W.A., LOCAL 2-69; RE O.L.R.B.....(Mar.)

369

Judicial Review - Practice and Procedure - Remedies - Stay - Union letter to Board alleging employer not complying with Board order - Union seeking filing of Board order with Court for enforcement - Employer letter to Board arguing enforcement proceedings inappropriate while appeal on jurisdictional issue still before courts - Employer letter satisfying Board of non-compliance - Union entitled to enforcement in absence of Court stay, even if appeal or judicial review in progress - Board dispensing with non-compliance hearing and directing filing of decision with Court

SACO FISHERIES LIMITED; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION.....(Feb.)

217

Judicial Review - Related Employer - Union seeking declaration that the Ontario Legal Aid Plan is a common employer with three community legal clinics - Clinics independent of OLAP but are funded by it and are accountable for the proper use of public funds - OLAP found to be engaged in related activities - Common control criteria met because OLAP influenced the management of the clinics - Board exercising discretion to make one employer declaration with respect to two clinics where OLAP had so involved itself in the affairs of the clinics that to ensure meaningful collective bargaining the union needed to be able to negotiate with OLAP - Employer seeking judicial review of decision on grounds Board ignored regulation for establishment and funding of clinics - Board finding of "intervention" in management and operation of clinics by personnel of applicant not unreasonable - Board not obliged to interpret and apply other legislation after threshold finding of "intervention" under related employer provision of *Labour Relations Act* - Board obliged to consider only labour relations aspects of clinics and not legal services aspect of their operations - Application dismissed

ONTARIO LEGAL AID PLAN, THE; RE ONTARIO PUBLIC SERVICE EMPLOYEES UNION, ONTARIO LABOUR RELATIONS BOARD, NEIGHBOURHOOD LEGAL SERVICES, INJURED WORKERS' CONSULTANTS, TENANT HOTLINE INC. AND COMMUNITY LEGAL EDUCATION ONTARIO(Jan.)

118

Judicial Review - Strike - Union members refusing to perform "struck work" - Members of a sister local lawfully locked out by their employer - Collective agreement not requiring employees to handle "struck work" - Whether sympathetic strike contrary to Act - Work refusal properly characterized as a strike - Board issuing direction which may have an educational effect in the printing industry where "struck work" clauses are common - Divisional Court upholding Board decision - Application dismissed

EMPRESS GRAPHICS INC., COUNCIL OF PRINTING INDUSTRIES OF CANADA ON BEHALF OF, AND ONTARIO LABOUR RELATIONS BOARD; RE G.C.I.U., LOCAL 500M(Mar.)

396

Jurisdictional Dispute - Adjournment - Construction Industry - Construction Industry Grievance - Practice and Procedure - Union alleging employer failed to hold mark-up meeting contrary to collective agreement - Intervener union seeking adjournment to permit disposal of issue as jurisdictional dispute - A grievance which raises an issue of work assignment, even if only at the remedy stage, brings a dispute within the jurisdictional dispute provisions of the Act - Jurisdictional aspect not arising until breach of collective agreement shown - Board reluctant to embark on jurisdictional dispute where unclear applicant union will succeed in grievance, or a useful purpose be served - Board directing scheduling of grievance referral hearing on allegation that agreement breached - If breach established, Board to convene further hearing on entitlement to damages - If then apparent that applicant union's entitlement to damages is consequent on assignment of work, intervener and any other union having fourteen days to file jurisdictional dispute - If jurisdictional dispute filed, Board to defer consideration of that aspect of applicant union's claim for damages pending disposition of jurisdictional dispute

SCHINDLER ELEVATOR CORPORATION, THE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION AND ONTARIO HYDRO, AND; RE THE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL ON BEHALF OF LAKE ONTARIO DISTRICT COUNCIL OF C.J.A.; RE I.U.E.C., LOCAL 50(Oct.)

1092

Jurisdictional Dispute - Adjournment - Construction Industry - Natural Justice - Practice and Procedure - Union alleging employer failed to hold mark-up meeting contrary to collective agreement - Intervener union seeking adjournment to permit disposal of issue as jurisdictional dispute - Union not seeking direction with respect to work assignment, but rather relief from conduct of employer - Union not required to file and be successful in jurisdictional dispute before proceeding with referral of construction industry grievance - Board

proceeding with grievance referral - Board giving all would-be parties opportunity to make representations on notice issue

ACCO CANADIAN MATERIAL HANDLING, A DIVISION OF BABCOCK INDUSTRIES CANADA INC.; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1592; RE IRONWORKERS DISTRICT COUNCIL OF ONTARIO AND B.S.O.I.W., LOCAL 700; RE THE ASSOCIATION OF MILLWRIGHTING CONTRACTORS OF ONTARIO INC.; RE ALLIED CONVEYORS LIMITED; RE ADAM CLARK LIMITED; RE COMSTOCK CANADA; RE NICHOLLS-RADTKE & ASSOCIATES LTD.; RE STATE CONTRACTORS INCORPORATED (Oct.)

993

Jurisdictional Dispute - Adjournment - Evidence - Judicial Review - Parties - Practice and Procedure - Demolition association requesting permission to intervene and asking for an adjournment - Association had not filed an intervention, attended the pre-hearing conference, or retained counsel - Board denying adjournment - Merits panel to decide intervener status issue - Board limiting the evidence of area and employer practice it will admit - Evidence limited to the demolition of similar structures in an operating environment in the Province of Ontario - Statute compelling Board to inquire into work involving the same or similar type of structure in the same or similar type of environment - Union bringing application for judicial review on the grounds that, *inter alia*, the Board committed an error of natural justice and exceeded its jurisdiction in denying adjournment and limiting the scope of admissible evidence - Judicial review dismissed by Divisional Court

FOSTER WHEELER LIMITED AND THE METROPOLITAN TORONTO DEMOLITION CONTRACTORS ASSOCIATION, THE ONTARIO LABOUR RELATIONS BOARD AND B.B.F., LODGE 128; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL AND L.I.U.N.A., LOCAL 1089 (May)

630

Jurisdictional Dispute - Collective Agreement - Construction Industry - General contractor assigning installation of patient service modules in hospital to its own carpenters and labourers - UA and IBEW claiming work - General contractor having no collective agreements with UA or IBEW but area past practice favouring claim - IBEW provincial agreement containing restrictive hiring practices - Practical effect of claim is to make it a request that the Board direct the general contractor to subcontract the work - Assignment of work to carpenters and labourers confirmed

PIGOTT CONSTRUCTION LIMITED AND C.J.A., LOCAL 27; RE U.A., LOCAL 46 AND I.B.E.W., LOCAL 353; RE L.I.U.N.A., LOCAL 506 (Apr.)

441

Jurisdictional Dispute - Construction Industry - Construction Industry Grievance - General contractor subletting the placing of concrete toppings at parking garage to trade contractor who assigned the work to labourers - Ironworkers asking general contractor to take back work and subcontract it to a company which had a collective agreement with the Ironworkers - General contractor telling subcontractor that it should employ Ironworkers but subcontractor not complying - Ironworkers filing grievance against general contractor for breach of subcontracting clause - Whether circumstances giving rise to grievance constituting jurisdictional dispute - General contractor acting as 'agent' for Ironworkers when it made demand of subcontractor - Circumstances constituting a jurisdictional dispute

FOUNDATION COMPANY OF CANADA LIMITED; RE B.S.O.I.W., LOCAL UNION 721; RE L.I.U.N.A., LOCAL 506; RE DURON ONTARIO LTD. (May)

521

Jurisdictional Dispute - Construction Industry - Construction Industry Grievance - Practice and Procedure - Grievance by respondent union alleging violation of subcontracting clause in collective agreement withdrawn - Whether Board having jurisdiction to continue to hear jurisdictional dispute where no one is requesting that the assignment of work be changed - Board excusing its discretion to not inquire further into jurisdictional dispute - Board's

practice is not to embark upon inquiries into academic questions - Advance rulings inappropriate - Labour relations considerations favour not proceeding further

E.S. FOX LIMITED, PRO INSUL LIMITED, S.M.W., LOCAL 562; RE H.F.I.A., LOCAL 95; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP; RE MASTER INSULATORS' ASSOCIATION OF ONTARIO INC. (May)

504

Jurisdictional Dispute - Construction Industry - Construction Industry Grievance - Union grieving employer's subcontracting of work to complainant - Complainant bringing application under jurisdictional dispute provisions -Complainant requesting Board direction that union cease requiring employer to refrain from purchasing from complainant - Board having no jurisdiction to deal with complaint under jurisdictional dispute provisions

E. H. PRICE LIMITED; RE S.M.W., LOCAL 47, ONTARIO SHEET METAL WORKERS' CONFERENCE; RE U.S.W.A., LOCAL 8990, ONTARIO SHEET METAL AND AIR HANDLING GROUP AND MEGATECH CONTRACTING LIMITED(Dec.)

1263

Jurisdictional Dispute - Construction Industry - Evidence - Board agreeing to receive employer and area past practice evidence of conveyer system installation - Board declining to admit evidence of past practice of other employers in other job assignments - Past practice and considerations of economy and efficiency are relevant to proper work assignment only if they can be tied to actual work in dispute

ACCO CANADIAN MATERIAL HANDLING, A DIVISION OF BABCOCK INDUSTRIES CANADA INC. AND IRONWORKERS DISTRICT COUNCIL OF ONTARIO AND B.S.O.I.W., LOCAL 700; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1244 ... (Sept.)

915

Jurisdictional Dispute - Construction Industry - Evidence - Practice and Procedure - Witness - Board power to compel the production of documents and to determine its own practice and procedure includes the power to direct that documents be made available for cross-examination - Board emphasizing the need to minimize document-related adjournments - Board directing further witnesses to bring documents relating to their testimony - Board directing respondent counsel to provide witnesses with copy of decision

ACCO CANADIAN MATERIAL HANDLING, A DIVISION OF BABCOCK INDUSTRIES CANADA INC. AND IRONWORKERS DISTRICT COUNCIL OF ONTARIO AND B.S.O.I.W., LOCAL 700; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1244(Aug.)

819

Jurisdictional Dispute - Construction Industry - Handling and installation of Hollywood Rail, Louden Rail, and support steel - Board considering collective bargaining relationships, skill and training, economy and efficiency, employer practice, area or industry practice, and employer preference - Board rejecting "end use" as appropriate consideration - Board directing work to be assigned to Ironworkers and Millwrights

NEWMARCH INC. AND U.A., LOCAL 463; RE B.S.O.I.W. LOCAL 721; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO, ON ITS OWN BEHALF AND ON BEHALF OF LOCAL 2309.....(Feb.)

179

Lockout - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Judicial Review - Remedies - Stay - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of

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PLAZA FIBREGLAS MANUFACTURING LTD., PLAZA ELECTROPLATING LTD., CITCOR MANUFACTURING LTD. AND SABINA CITRON; RE ONTARIO LABOUR RELATIONS BOARD AND U.S.W.A..... (June)

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Lockout - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Remedies - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches, to pay union's negotiating costs, to return work to original company and make no further movement without disclosure to union, to provide union with names and addresses of bargaining unit employees as of lockout date, and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees

PLAZA FIBERGLAS MANUFACTURING LIMITED AND PLAZA ELECTROPLATING LTD., CITCOR MANUFACTURING LTD., AND SABINA CITRON; RE U.S.W.A..... (Feb.)

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BOURQUE CONSUMER ELECTRONICS SERVICE INC. AND MR. PIERRE BOURQUE; RE C.A.W. AND ITS LOCAL 673

(Oct.)

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Natural Justice - Certification - Charter of Rights and Freedoms - Evidence - Practice and Procedure - Witness - Employee sidesperson while former MPP had objected in Legislature to provision of Act - Constitutionality of provision challenged in current proceedings - Employer alleging reasonable apprehension of bias - Board rejecting allegation - Board members appointed because of labour relations experience - Remarks made in different context nineteen years ago - Union seeking to call expert witness on content of freedom of association in European countries - Evidence analogous to legal argument about proper scope of freedom of association - Evidence not admissible in determining content of *Charter* freedom - Evidence admissible in determining whether provision reasonable limit to *Charter* freedom

PINKERTON'S OF CANADA; C.G.A.; RE RICHARD BIBEAULT; RE INCO LIMITED; RE ATTORNEY-GENERAL OF ONTARIO; RE NATIONAL PROTECTIVE SERVICES COMPANY LIMITED; RE GEORGE FAULKENBURG; RE BOARD OF MANAGEMENT FOR THE METROPOLITAN TORONTO ZOO; RE INTERNATIONAL UNION UNITED PLANT GUARDS, LOCAL 1962; RE RON SAXTON; RE BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE GORDON A. SOUTHORN; RE WACKENHUT OF CANADA LIMITED; RE SHANE FREEMAN; RE U.S.W.A.; RE LARRY BISHOP (Jan.)

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Natural Justice - Certification - Construction Industry - Practice and Procedure - Reconsideration - Terminal Date - Employer requesting reconsideration of certifications on grounds employees failed to receive notice - Employer pleading own failure either to post Notice of Application or to file Return of Posting Card - Union filed Advice of Posting Card but did not fill in necessary information - Union filing Card after terminal date - Not unreasonable to expect union to act with promptness and diligence in checking posting where union asking Board to exercise discretion to certify without a hearing - Board directing matter to be listed for hearing representations on notice issues

VISSERS NURSERY; RE L.I.U.N.A., LOCAL 183 (Sept.)

989

Natural Justice - Certification - Practice and Procedure - Board failing to respond to petitioner request for local hearing - Petitioners not attending scheduled hearing in Toronto - Board declining to schedule additional hearing to consider statements of desire - Board posting in workplace gave notice of time and place of scheduled hearing and consequences of failure to appear - Consequences also set out in Board Rules of Procedure - Petitioners not entitled to assume request for change of venue would be granted - Interim certificate issuing

HOLT-MCDERMOTT MINE, AMERICAN BARRICK RESOURCES CORPORATION CARRYING ON BUSINESS AS; RE U.S.W.A.; RE GROUP OF EMPLOYEES (Mar.)

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KOHUT, JOHN; RE C.A.W., AND ITS LOCAL 303; RE GENERAL MOTORS OF CANADA LIMITED	(Oct.)	1043
Natural Justice - Duty of Fair Representation - Practice and Procedure - Settlement - Unfair Labour Practice - Complainants alleging union breached fair representation duty by agreeing to settlement of employer's severance pay obligations - Approximately three years passing		

ing between signing of settlement and filing of complaint - Board reluctant to allow litigation of complaints after such extreme delay, especially where matter complained of involves a settlement which has been executed and honoured, and when the effect of remedial relief sought is to nullify or rewrite the settlement - Complaint dismissed

COALITION OF LAID-OFF WORKERS, THE, ONTARIO, CANADA HEREINAFTER KNOWN AS THE C.L.W.; RE C.A.W., LOCALS 439 AND 458; RE VARTY CORPORATION (Oct.)

1019

Natural Justice - Employee - Employee Reference - Parties - Only parties to a bargaining relationship may initiate employee reference - Persons whose status as "employees" at issue entitled to participate in proceedings - Such persons entitled to notice of application and of Officer's inquiry

PETERBOROUGH COUNTY BOARD OF EDUCATION; RE C.U.P.E. AND ITS LOCAL 1680..... (Mar.)

330

Natural Justice - Judicial Review - Practice and Procedure - Supreme Court of Canada finding no breach of natural justice for Board panel hearing case to discuss policy implications of a draft decision at Full Board meeting - Rules of natural justice should not discourage administrative bodies from taking advantage of accumulated experience of their members - Board justified in taking appropriate measures to ensure conflicting results not inadvertently reached in similar cases - Full Board being formalized consultation process which cannot be used to force or induce decision makers to adopt positions with which they do not agree - Procedure not giving rise to reasonable apprehension of bias - Parties having right to respond to any new ground arising at Full Board on which they have not made representations - Appeal dismissed

CONSOLIDATED-BATHURST PACKAGING LTD.; RE I.W.A., LOCAL 2-69; RE O.L.R.B..... (Mar.)

369

Parties - Adjournment - Evidence - Judicial Review - Jurisdictional Dispute - Practice and Procedure - Demolition association requesting permission to intervene and asking for an adjournment - Association had not filed an intervention, attended the pre-hearing conference, or retained counsel - Board denying adjournment - Merits panel to decide intervener status issue - Board limiting the evidence of area and employer practice it will admit - Evidence limited to the demolition of similar structures in an operating environment in the Province of Ontario - Statute compelling Board to inquire into work involving the same or similar type of structure in the same or similar type of environment - Union bringing application for judicial review on the grounds that, *inter alia*, the Board committed an error of natural justice and exceeded its jurisdiction in denying adjournment and limiting the scope of admissible evidence - Judicial review dismissed by Divisional Court

FOSTER WHEELER LIMITED AND THE METROPOLITAN TORONTO DEMOLITION CONTRACTORS ASSOCIATION, THE ONTARIO LABOUR RELATIONS BOARD AND B.B.F., LODGE 128; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL AND L.I.U.N.A., LOCAL 1089 (May)

630

Parties - Construction Industry - Construction Industry Grievance - Whether employers' organizations which are constituents of an employer bargaining agency are parties to construction industry referrals - No right to standing under Act - Board also rejecting right to party standing based on argument that their legal rights are affected by issue to be arbitrated - Issue is whether general contractors are bound to trade appendices to the collective agreement or only to local union schedules - No legal right to participate found in collective agreement - No special circumstances leading Board to exercise its discretion to give employers' organizations standing - Union local not entitled to standing - Union's interest akin to that of a commercial interest - Merits of grievance to be set down for hearing

JADDCO E. ANDERSON LTD.; RE L.I.U.N.A., LOCAL 1036 (May)

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D-K CONSTRUCTION LTD.; RE ANGELO GANASSIN; RE C.J.A., LOCAL 785, AND THE ONTARIO PROVINCIAL COUNCIL; RE MICHAEL PARKER; RE L.I.U.N.A., LOCAL 1081, AND ONTARIO PROVINCIAL DISTRICT COUNCIL.....	503
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Parties - First Contract Arbitration - "Where the parties are unable to effect a first collective agreement" refers to union and employer parties to present application - First contract arbitration not precluded by an earlier collective agreement covering the same employees where the parties to that agreement were the employer and an employee association later displaced by the applicant union - Given the magnitude of concessions it was seeking, the employer's failure to provide financial data during bargaining was a failure to make reasonable or expeditious efforts to make a collective agreement - In the circumstances, this failure was also an uncompromising bargaining position without reasonable justification - First contract arbitration directed	
BOURQUE CONSUMER ELECTRONICS SERVICE INC.; RE C.A.W. AND ITS LOCAL 673	821
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Petition - Build-Up - Certification - Interference in Trade Unions - Intimidation and Coercion - Membership Evidence - Representation Vote - Unfair Labour Practice - Whether Board should order a vote to be conducted in the future - Employer having no firm plans for build-up as of the application date nor was build-up of the magnitude that would lead the Board to order and defer a vote - Employer alleging that misconduct by employee organizing committee made union's membership evidence unreliable - Misconduct alleged to have occurred including intimidation of petitioners - Conduct of employee organizers not leading	

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GSW INC. C.O.B. AS GSW HEATING PRODUCTS DIVISION; RE U.S.W.A.; RE GROUP OF EMPLOYEES	535
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Petition - Certification - Employer Support - Unfair Labour Practice - Whether employer providing union with names and addresses of employees during organizing campaign prohibiting certification of union - Provision of this information not constituting "support" within the meaning of s.13 - Meeting of employees called by employer factor to consider in looking at voluntariness of petition - No violation of Act when lead hands circulating petition expressed personal views on the consequences of unionization - Failure of one of two originators/circulators of petition to testify another factor to consider - Petition not voluntary - Certificate issuing	
CONTINUOUS MINING SYSTEMS LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES	404
Petition - Certification - Evidence - Fraud - Practice and Procedure - Reconsideration - Employee seeking reconsideration of Board's decision certifying union on basis that application tainted by fraud - Assertion that another employee circulated a petition but never intended to file it with the Board - Further allegation that this employee was acting as an agent for the union with respect to his petition activity - Union making non-suit application and electing to call no evidence - Reconsideration application dismissed - Circulator of the petition was not an agent or an officer of the union - No evidence as to why petition was not filed - Evidence consistent with theory that employees change their minds concerning support for a union - Objecting employees bound by the actions of their representative after selecting person to represent their interests in opposing the union	
RUSSELL H. STEWART CONSTRUCTION COMPANY LIMITED; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES	464
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WESTLAKE ELECTRICAL CONTRACTORS LIMITED; RE I.B.E.W., LOCAL 353; RE GROUP OF EMPLOYEES	1163

Petition - Certification - Practice and Procedure - Termination - Applicant employee was petitioner in earlier certification proceeding - Whether Board discretion "to bar an unsuccessful applicant for any period from the date of the dismissal of the unsuccessful application" applies to unsuccessful petitioner bringing termination application - Act requiring Board to entertain timely termination application - Certification not prior "unsuccessful application" - Vote directed

INZOLA CONSTRUCTION (1976) LIMITED; RE CALOGERO MATTINA; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL ON BEHALF OF ITS AFFILIATED LOCAL UNIONS 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081 AND 1089(Dec.)

1293

Petition - Certification - Practice and Procedure - Timeliness - Whether petition sent to the Board on the terminal date by Priority Post timely - 'Registered' mail including Priority Post - Petition timely

SAXON ATHLETIC MANUFACTURING INC.; RE IWA - CANADA; RE GROUP OF EMPLOYEES(May)

618

Petition - Termination - Circulators of petition holding positions closer to management than other employees - Board less inclined to draw inference adverse to voluntariness of petition in termination application than in certification application - Sufficient assurance of voluntariness in facts of case - Board directing representation vote

KITCHENER BEVERAGES LIMITED, A GROUP OF EMPLOYEES EMPLOYED BY; RE U.F.C.W.; RE KITCHENER BEVERAGES LIMITED(Mar.)

291

Petition - Termination - Evidence - Inadequate first hand evidence of origination and preparation of petition - Gaps in evidence of custody - Incomplete evidence on circulation of petition and circumstances surrounding each signature - Evidence inconsistent - Board unable to accept petition as voluntary expression of employee wishes - Application dismissed

HULLY GULLY LONDON LTD.; RE RONALD GARY EMMONS; RE R.W.D.S.U., AFL, CIO, CLC(Feb.)

160

Petition - Termination - Petition circulated by brother-in-law of supervisor - Persons circulating petition having close working relationship with supervisor and living in same household - Petition not voluntary expression of employee wishes

BENOMA METAL PRODUCTS LIMITED; RE CHRISTOPHER CLAYTON AND GUISEPPE TOCCI; RE U.S.W.A.(Sept.)

917

Petition - Termination - Termination applicant believed employer's intention to increase fishing quotas if fishing boat crew members got rid of union - Applicant used this to persuade crew members to sign a termination petition - Board not persuaded petition voluntary - Application dismissed

POMBINHO, JOAO; RE LOCAL 444 C.A.W.(Apr.)

457

Petition - Termination - Three of four employees who had signed petition to terminate union's bargaining rights were family members of the owner - Effect of existence of family relationships on voluntariness of petition discussed - Petition found to be voluntary - Vote ordered

REITZEL, ALAN; RE S.M.W., THE ONTARIO SHEET METAL WORKERS' CONFERENCE AND THE S.M.W., LOCALS 30, 47, 235, 392, 397, 473, 504, 537, 539, 562, AND 269(Aug.)

881

Picketing - Construction Industry - Health and Safety - Remedies - Strike - Board asked to declare that respondent employees had engaged in an unlawful strike by refusing to cross picket line established by another union - Argued that employees did not cross picket line because they believed it would be dangerous to do so - Picket line tension runs high but

actual violence is rare - Board finding nothing in facts which would justify employees' refusal - Declaration of unlawful strike and direction to cease engaging in unlawful activity issuing

HORTON CBI, LIMITED; RE LEO E. EVANS, JOE L. DA SILVA, TERRANCE R. MCGUIRE, AND SANFORD JONES; RE B.B.F., LOCAL 128 (June)

648

Practice and Procedure - Adjournment - Collective Agreement - First Contract Arbitration - Interest Arbitration - Judicial Review - Stay - Employer and termination applicant requesting that Board adjourn its hearings to arbitrate the settlement of a first collective agreement pending a stay and judicial review application in the courts - Adjournment denied - Board proceeding with hearings in absence of employer - Board amending significant number of articles in union's proposed collective agreement to reflect what should reasonably be contained in a first collective agreement -Board deleting paid education leave, COLA and pension plan provisions

VENTURE INDUSTRIES CANADA, LTD.; RE C.A.W. (July)

809

Practice and Procedure - Adjournment - Construction Industry - Construction Industry Grievance - Judicial Review - Natural Justice - Grievance filed by union alleging employer breached collective agreement by not hiring through hiring hall - Employer asking by letter for adjournment -Employer not appearing at hearing - Employer found to have breached collective agreement - Board not granting adjournments unless on consent of parties - Otherwise request must be made before panel on hearing date - Employer's reconsideration request denied - Employer bringing application for judicial review on the ground that the Board failed to comply with the rules of natural justice by proceeding with hearing in employer's absence - Judicial review dismissed by Divisional Court

TODD RAMSAY INTERIORS INC. AND JAMES R. TODD; RE C.J.A., LOCAL 93 AND THE ONTARIO LABOUR RELATIONS BOARD..... (June)

748

Practice and Procedure - Adjournment - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Union alleging employer failed to hold mark-up meeting contrary to collective agreement - Intervener union seeking adjournment to permit disposal of issue as jurisdictional dispute - A grievance which raises an issue of work assignment, even if only at the remedy stage, brings a dispute within the jurisdictional dispute provisions of the Act - Jurisdictional aspect not arising until breach of collective agreement shown - Board reluctant to embark on jurisdictional dispute where unclear applicant union will succeed in grievance, or a useful purpose be served - Board directing scheduling of grievance referral hearing on allegation that agreement breached - If breach established, Board to convene further hearing on entitlement to damages - If then apparent that applicant union's entitlement to damages is consequent on assignment of work, intervener and any other union having fourteen days to file jurisdictional dispute - If jurisdictional dispute filed, Board to defer consideration of that aspect of applicant union's claim for damages pending disposition of jurisdictional dispute

SCHINDLER ELEVATOR CORPORATION, THE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION AND ONTARIO HYDRO, AND; RE THE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL ON BEHALF OF LAKE ONTARIO DISTRICT COUNCIL OF C.J.A.; RE I.U.E.C., LOCAL 50 (Oct.)

1092

Practice and Procedure - Adjournment - Construction Industry - Construction Industry Grievance - Parties requesting that Board adjourn hearing date - Chronology indicating that on at least three separate occasions the parties had agreed to adjourn hearing dates which had been scheduled either at their specific request or in consultation with them - Parties reminded of institutional concerns of Board - Increased risk that adjournment will not be

granted where cogent reason for request not provided to Board - Proceeding adjourned *sine die*

W.G. GALLAGHER CONSTRUCTION LIMITED; RE THE ONTARIO COUNCIL OF P.A.T.; RE P.A.T., DISTRICT COUNCIL 46..... (June)

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Practice and Procedure - Adjournment - Construction Industry - Jurisdictional Dispute - Natural Justice - Union alleging employers' failed to hold mark-up meeting contrary to collective agreement - Intervener union seeking adjournment to permit disposal of issue as jurisdictional dispute - Union not seeking direction with respect to work assignment, but rather relief from conduct of employer - Union not required to file and be successful in jurisdictional dispute before proceeding with referral of construction industry grievance - Board proceeding with grievance referral - Board giving all would-be parties opportunity to make representations on notice issue

ACCO CANADIAN MATERIAL HANDLING, A DIVISION OF BABCOCK INDUSTRIES CANADA INC.; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1592; RE IRONWORKERS DISTRICT COUNCIL OF ONTARIO AND B.S.O.I.W., LOCAL 700; RE THE ASSOCIATION OF MILLWRITING CONTRACTORS OF ONTARIO INC.; RE ALLIED CONVEYORS LIMITED; RE ADAM CLARK LIMITED; RE COMSTOCK CANADA; RE NICHOLLS-RADTKE & ASSOCIATES LTD.; RE STATE CONTRACTORS INCORPORATED

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Practice and Procedure - Adjournment - Counsel for respondent requesting adjournment on day before hearing - "Personal and business" reasons preventing respondent from retaining qualified counsel and preparing case - Request untimely and without cogent basis - Adjournment denied

SPIDER-MAPLE LIFT LIMITED AND/OR SPIDER WASTE MANAGEMENT SERVICES AND/OR INNISFIL LANDFILL CORPORATION; RE I.U.O.E., LOCAL 793

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Practice and Procedure - Adjournment - Evidence - Judicial Review - Jurisdictional Dispute - Parties - Demolition association requesting permission to intervene and asking for an adjournment - Association had not filed an intervention, attended the pre-hearing conference, or retained counsel - Board denying adjournment - Merits panel to decide intervener status issue - Board limiting the evidence of area and employer practice it will admit - Evidence limited to the demolition of similar structures in an operating environment in the Province of Ontario - Statute compelling Board to inquire into work involving the same or similar type of structure in the same or similar type of environment - Union bringing application for judicial review on the grounds that, *inter alia*, the Board committed an error of natural justice and exceeded its jurisdiction in denying adjournment and limiting the scope of admissible evidence - Judicial review dismissed by Divisional Court

FOSTER WHEELER LIMITED AND THE METROPOLITAN TORONTO DEMOLITION CONTRACTORS ASSOCIATION, THE ONTARIO LABOUR RELATIONS BOARD AND B.B.F., LODGE 128; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL AND L.I.U.N.A., LOCAL 1089

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Practice and Procedure - Adjournment - Judicial Review - Unfair Labour Practice - Board refusing to grant adjournment - Board acting fairly and reasonably - Application dismissed

BALANYK, ELIZABETH; RE THE GREATER NIAGARA GENERAL HOSPITAL, ONTARIO NURSES' ASSOCIATION, PATRICIA STUART, MARIANNE ORCUTT, AL WEIER, LIZ WOODS, AND O.L.R.B.

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Practice and Procedure - Adjournment - On morning of hearing counsel advising Board by telephone that the parties were adjourning the matter *sine die* - Last minute adjournments can

cause Board to incur unnecessary expenses and squander its resources - Parties who do not request an adjournment in a timely manner risk not being granted the adjournment	
CANADA FRAMING, 560742 ONTARIO LTD. C.O.B.; RE L.I.U.N.A., LOCAL 183; RE C.J.A., LOCAL 27; RE NORTH YORK CONSTRUCTION LTD.....	(May) 490
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I.B.E.W., AND THE INTERNATIONAL BROTHERHOOD CONSTRUCTION COUNCIL OF ONTARIO AND THE I.B.E.W., LOCAL 115; RE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO ON BEHALF OF ALL CONTRACTOR MEMBERS OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF QUINTE/ST. LAWRENCE AND THE ELECTRICAL CONTRACTORS ASSOCIATION OF QUINTE/ST. LAWRENCE.....	(Mar.) 283
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RAMJIT, BO; RE MANUEL PUCHE.....	(Oct.) 1090
Practice and Procedure - Bargaining Unit - Certification - Construction Industry - Application for certification relating to "white area" - Board following its usual practice of describing the unit in reference to the township in which the project is located and the townships adjacent thereto - Employer requesting hearing to make representations on numerous matters - Hearing not necessary - Certificate issuing	
PROCON DEVELOPMENTS LTD.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL	(Apr.) 459
Practice and Procedure - Bargaining Unit - Certification - Construction Industry - Employee - Judicial Review - Board using tests in <i>Gilvesy</i> and <i>E & E Seegmiller</i> to determine whether persons should be included in the bargaining unit for purposes of "the count" - Employee included in unit because majority of his working time on date of application spent performing carpentry work - Certificates issuing - Employer bring application for judicial review on the grounds that, <i>inter alia</i> , the Board erred in considering the type of work performed by employees solely on the application date as opposed to a more representative period - Judicial review dismissed by Divisional Court	
GENSPEC CONSTRUCTION INCORPORATED; RE C.J.A., LOCAL 27 AND ONTARIO LABOUR RELATIONS BOARD	(Apr.) 486
Practice and Procedure - Bargaining Unit - Certification - Construction Industry - Officer report-	

ing back to Board on employee list problems - Respondent asking for hearing to make submissions on report but later requesting cancellation of hearing - Union opposing request - Hearing proceeding in absence of respondent - No valid reason for cancellation - Remaining issues in certification resolved by Board - Certificates issuing

B.J. LAVERTY CONSTRUCTION SEBRINGVILLE INC.; RE L.I.U.N.A., LOCAL 506 (May)

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Practice and Procedure - Bargaining Unit - Certification - Construction Industry - Reconsideration - Applicant requesting variation of clarity note in earlier certification decision - Clarity note not part of unit description - Certificate issued subject to terms of Board decision, including any clarity note - Reconsideration denied

CONCRETE SYSTEMS, 799316 ONTARIO INC. C.O.B. AS; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL.....(Mar.)

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Practice and Procedure - Bargaining Unit - Certification - Employer challenging inclusion of certain employees in bargaining unit on basis of community of interest - Employer requesting matter be heard by panel without exchange of pleadings - Hearings by panel liable to be inefficient use of resources where factual issues have not been narrowed by an officer inquiry or exchange of pleadings - Board directing inquiry by Labour Relations Officer

BRUCE W. SMITH BUILDING MATERIALS LTD.; RE TEAMSTERS' UNION, LOCAL NO. 141; RE GROUP OF EMPLOYEE.....(Mar.)

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Practice and Procedure - Bargaining Unit - Certification - Pre-Hearing Vote - Displacement application for pre-hearing vote for unit broader than held by incumbent - Board practice in such situations to establish two voting constituencies of incumbent unit and add-on segment - Applicant union must have requisite support in each voting constituency to be entitled to a vote in each - Board directing vote in two separate constituencies

GRANT FOREST PRODUCTS, GRANT INDUSTRIES CORP. AND GRANT FOREST PRODUCTS CORP. C.O.B. AS; RE C.P.U.; RE GRANT FOREST PRODUCTS EMPLOYEES' ASSOCIATION

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Practice and Procedure - Certification - Board reviewing factors for consideration in determining whether to extend terminal date - Board declining to extend terminal date - Certificate issuing

VENTRA GROUP INC.; RE C.A.W.; RE GROUP OF EMPLOYEES

(Aug.)

903

Practice and Procedure - Certification - Charter of Rights and Freedoms - Constitutional Law - Certification applications by USWA and CGA to represent guards - Section 12 of Act precluding Board from certifying USWA because it admits to membership persons other than guards and from certifying CGA because it is affiliated with the USWA - Whether a portion of s.12 is inconsistent with the "freedom of association" guaranteed by s.2(d) of the Charter - Respondents bringing non-suit motion after applicants and interveners had concluded calling evidence on s.2(d) - Non-suit motion succeeding - Obtaining of bargaining rights through certification not included within the ambit of freedom of association under s.2(d) of the Charter - Certification is a statutory creation not available to an individual employee - Group rights that have no individual counterpart or no express constitutional protection

not coming within the ambit of s.2(d) - No constitutional right under s.2(d) to certification free of the constraints imposed by s.12 of the Act - Certification applications dismissed

PINKERTON'S OF CANADA LTD.; RE C.G.A; RE RICHARD BIBEAULT; RE INCO LIMITED; RE ATTORNEY-GENERAL OF ONTARIO; RE NATIONAL PROTECTIVE SERVICES COMPANY LIMITED; RE GEORGE FAULKENBURG; RE BOARD OF MANAGEMENT FOR THE METROPOLITAN TORONTO ZOO; RE INTERNATIONAL UNION UNITED PLANT GUARDS, LOCAL 1962; RE RON SAXTON; RE BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE GORDON A. SOUTHORN; RE WACKENHUT OF CANADA LIMITED; RE SHANE FREEMAN; RE U.S.W.A.; RE LARRY BISHOP (June)

673

Practice and Procedure - Certification - Charter of Rights and Freedoms - Evidence - Natural Justice - Witness - Employee sidesperson while former MPP had objected in Legislature to provision of Act - Constitutionality of provision challenged in current proceedings - Employer alleging reasonable apprehension of bias - Board rejecting allegation - Board members appointed because of labour relations experience - Remarks made in different context nineteen years ago - Union seeking to call expert witness on content of freedom of association in European countries - Evidence analogous to legal argument about proper scope of freedom of association - Evidence not admissible in determining content of *Charter* freedom - Evidence admissible in determining whether provision reasonable limit to *Charter* freedom

PINKERTON'S OF CANADA; C.G.A.; RE RICHARD BIBEAULT; RE INCO LIMITED; RE ATTORNEY-GENERAL OF ONTARIO; RE NATIONAL PROTECTIVE SERVICES COMPANY LIMITED; RE GEORGE FAULKENBURG; RE BOARD OF MANAGEMENT FOR THE METROPOLITAN TORONTO ZOO; RE INTERNATIONAL UNION UNITED PLANT GUARDS, LOCAL 1962; RE RON SAXTON; RE BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE GORDON A. SOUTHORN; RE WACKENHUT OF CANADA LIMITED; RE SHANE FREEMAN; RE U.S.W.A.; RE LARRY BISHOP (Jan.)

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Practice and Procedure - Certification - Construction Industry - Certification application mailed to Board by registered mail on a Sunday deemed to have been filed on that date - Employer requesting Board to depart from its usual practice in construction industry of determining membership support as of application date - Board explaining its rationale for different practices in the construction industry - Board not departing from its usual practice in this case

AL GORDON ELECTRIC LIMITED; RE I.B.E.W., LOCAL 120; RE GROUP OF EMPLOYEES (June)

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Practice and Procedure - Certification - Construction Industry - Evidence - Membership Evidence - Proper employee notice requiring extension of terminal date in certification application - Board permitting union to file additional membership evidence up to new terminal date

SPENCER J. HAWKES INC.; RE IRONWORKERS DISTRICT COUNCIL OF ONTARIO (Sept.)

966

Practice and Procedure - Certification - Construction Industry - Natural Justice - Reconsideration - Terminal Date - Employer requesting reconsideration of certifications on grounds employees failed to receive notice - Employer pleading own failure either to post Notice of Application or to file Return of Posting Card - Union filed Advice of Posting Card but did not fill in necessary information - Union filing Card after terminal date - Not unreasonable to expect union to act with promptness and diligence in checking posting where union asking Board to exercise discretion to certify without a hearing - Board directing matter to be listed for hearing representations on notice issues

VISSERS NURSERY; RE L.I.U.N.A., LOCAL 183 (Sept.)

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Practice and Procedure - Certification - Construction Industry - Parties agreeing to removal of two names from "Schedule A" employee list - Employer later asserting these individuals should be included for purposes of count - Board not permitting parties to resile from agreement

BEAVERBROOK ESTATES INC.; RE L.I.U.N.A., LOCAL 183(Jan.)

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Practice and Procedure - Certification - Construction Industry - Union making sixth certification application for substantially the same group of employees in two months - Respondent employer requesting that application be dismissed and bar imposed - Board disagreeing with argument that the mere frequency of applications warrants dismissal and a bar - Repeated applications may be vexatious or an abuse of process but these concerns not raised here - Motion dismissed - Certification application to proceed

D.J. VENASSE CONSTRUCTION LIMITED; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL(Apr.)

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Practice and Procedure - Certification - Employee - Employee who verified time sheets and signed discharge letters not managerial - Employee not making final decisions - Board having no obligation under *Statutory Powers Procedure Act* to give written reasons for evidentiary ruling - Statutory obligation relating to final, not interim, decisions

ZAIDAN REALTY CORPORATION; RE U.P.G.W.A., LOCAL 1962(Dec.)

1357

Practice and Procedure - Certification - Evidence - Fraud - Petition - Reconsideration - Employee seeking reconsideration of Board's decision certifying union on basis that application tainted by fraud - Assertion that another employee circulated a petition but never intended to file it with the Board - Further allegation that this employee was acting as an agent for the union with respect to his petition activity - Union making non-suit application and electing to call no evidence - Reconsideration application dismissed - Circulator of the petition was not an agent or an officer of the union - No evidence as to why petition was not filed - Evidence consistent with theory that employees change their minds concerning support for a union - Objecting employees bound by the actions of their representative after selecting person to represent their interests in opposing the union

RUSSELL H. STEWART CONSTRUCTION COMPANY LIMITED; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES.....(Apr.)

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Practice and Procedure - Certification - Evidence - Membership Evidence - Trade union membership evidence lost in mail en route to Board - Union filing photocopies with Form 9 Declaration attesting to rigorous review and confirmation of validity of membership evidence - Board accepting photocopies as meeting requirements of Rules of Procedure - Photocopies backed by Declaration constituting "best evidence" under circumstances - Interim certificate issuing

HOLT-MCDERMOTT MINE, AMERICAN BARRICK RESOURCES CORPORATION CARRYING ON BUSINESS AS; RE U.S.W.A.; RE GROUP OF EMPLOYEES

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Practice and Procedure - Certification - Evidence - Membership Evidence - Union business agent unable to recall whether he had reviewed information on Form 9 Declaration before signing and filing - Form 9 improper and unreliable under circumstances - Application dismissed

599207 ONTARIO INC.; RE H.E.R.E., LOCAL 604, A.F. OF L., C.I.O., C.L.C..(Dec.)

1205

Practice and Procedure - Certification - Fraud - Reconsideration - Allegation that employee who circulated petition was union agent with no intention to file petition or appear before Board

- Allegation, if true, may constitute fraud and abuse of Board's process - Matter set down for hearing

RUSSELL H. STEWART CONSTRUCTION COMPANY LIMITED; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES.....(Jan.)

79

Practice and Procedure - Certification - Membership Evidence - Timeliness - Employer and petitioners arguing that union not entitled to certification because of employer support and alleging that the union had discriminated against one petitioner by not giving him an opportunity to join the union - Allegations not entertained by Board because they were not made in a timely manner as required by Rule 72 - Further allegations of defective membership evidence - Board usually treating non-sign/non-pay allegations with greater latitude on question of timeliness but Rule 72 still applicable - Membership cards alleged to be defective must be identified - Board direction to that effect not complied with - Allegations not entertained - Board also denying access to membership evidence for the purpose of having the employer's handwriting analyst review it - Parties agreeing certification application should be dismissed

ROYTEC VINYL CO., 732571 ONTARIO LTD. AND 732570 ONTARIO INC. C.O.B. IN PARTNERSHIP AS; RE LAUNDRY & LINEN DRIVERS AND INDUSTRIAL WORKERS UNION, LOCAL 847, AFFILIATED WITH THE TEAMSTERS' UNION; RE GROUP OF EMPLOYEES

(June)

Practice and Procedure - Certification - Natural Justice - Board failing to respond to petitioner request for local hearing - Petitioners not attending scheduled hearing in Toronto - Board declining to schedule additional hearing to consider statements of desire - Board posting in workplace gave notice of time and place of scheduled hearing and consequences of failure to appear - Consequences also set out in Board Rules of Procedure - Petitioners not entitled to assume request for change of venue would be granted - Interim certificate issuing

HOLT-MCDERMOTT MINE, AMERICAN BARRICK RESOURCES CORPORATION CARRYING ON BUSINESS AS; RE U.S.W.A.; RE GROUP OF EMPLOYEES.....(Mar.)

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Practice and Procedure - Certification - Natural Justice - Reconsideration - Employer alleging it did not receive timely notice of certification application - Employer disputing facts relating to notice and posting on which decision based - Board directing listing for hearing on matters raised

P.H. ATLANTIC PLUMBING & HEATING DIVISION OF 629629 ONTARIO LIMITED; RE U.A., LOCAL 463.....(Dec.)

1313

Practice and Procedure - Certification - Natural Justice - Reconsideration - Employer arguing it received no notice of hearing - Employer failing to rebut statutory presumption that notice sent by mail was received - Application for reconsideration dismissed

COSNAUT STEEL INC.; RE B.S.O.I.W., LOCAL 721

(Dec.)

Practice and Procedure - Certification - Natural Justice - Regular posting at employer's head office inadequate to give notice to all affected employees - Board directing employer to provide Board with employee address list for notice by mail

WACKENHUT OF CANADA LTD.; RE U.S.W.A.....(Mar.)

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Practice and Procedure - Certification - Natural Justice - Representation Vote - Employer failing to post Form 70 with Officer's Report until terminal date - Board directing employer to post decision of Board notifying employees of right to make representation on vote or report - Certificate to issue if no representations received within fifteen days

SAINT LUKE'S PLACE; RE S.E.I.U., LOCAL 204 AFFILIATED WITH S.E.I.U., A.F. OF L., C.I.O., C.L.C.....(Dec.)

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Practice and Procedure - Certification - Natural Justice - Trade Union - Union filing membership evidence - Union name on cards different from name under which application brought - Board will not treat application for membership as membership in another union unless former is local of latter - Board satisfied application intended to be brought by union named on membership cards - Board permitting amendment to union name on application - Board extending terminal date and directing new posting of Form 6 Notice of Application at workplace

GOODY CANADA LIMITED; RE A.C.T.W.U. (Feb.)

159

Practice and Procedure - Certification - Petition - Board reviewing law with respect to petitions - Objecting employees failing to demonstrate voluntariness of petition - Certificate issuing

WESTLAKE ELECTRICAL CONTRACTORS LIMITED; RE I.B.E.W., LOCAL 353; RE GROUP OF EMPLOYEES (Nov.)

1163

Practice and Procedure - Certification - Petition - Termination - Applicant employee was petitioner in earlier certification proceeding - Whether Board discretion "to bar an unsuccessful applicant for any period from the date of the dismissal of the unsuccessful application" applies to unsuccessful petitioner bringing termination application - Act requiring Board to entertain timely termination application - Certification not prior "unsuccessful application" - Vote directed

INZOLA CONSTRUCTION (1976) LIMITED; RE CALOGERO MATTINA; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL ON BEHALF OF ITS AFFILIATED LOCAL UNIONS 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081 AND 1089 (Dec.)

1293

Practice and Procedure - Certification - Petition - Timeliness - Whether petition sent to the Board on the terminal date by Priority Post timely - 'Registered' mail including Priority Post - Petition timely

SAXON ATHLETIC MANUFACTURING INC.; RE IWA - CANADA; RE GROUP OF EMPLOYEES (May)

618

Practice and Procedure - Certification - Trade Union - Six month bar imposed against local of union following unsuccessful representation vote - Parent union of local filing certification application 4 weeks later - Whether bar applies to parent union - Whether Board should exercise its discretion to decline to hear application - Application to be processed - Parent union a separate legal entity - Bar not applicable - No compelling reason to decline to entertain application

REPLA LIMITED; RE C.J.A. (May)

612

Practice and Procedure - Certification - Trade Union - Trade Union Status - No finding of status at the time application was filed, but its status was recognized by the Board in another unrelated proceeding, before the hearing date in this application - Union not obliged to prove status - Outstanding status issue no bar to meeting with Labour Relations Officer - Certificate issuing

SHORELINE MOTOR HOTEL, RONSCOTT INC. C.O.B. AS; RE HOSPITALITY, COMMERCIAL AND SERVICE EMPLOYEES UNION, LOCAL 73 OF H.E.R.E. (Dec.)

1334

Practice and Procedure - Charter of Rights and Freedoms - Evidence - Natural Justice - Complainant asserting right to tape record proceedings and to rely upon recording as "transcript" - Complainant alleging Board's failure to keep official transcript a violation of common law, natural justice, and "fundamental justice" requirement of section 7 of *Charter* - No requirement in *Labour Relations Act* or *Statutory Powers Procedure Act* that Board produce official transcript - No common law or natural justice requirement - Board not per-

suaded section 7 of *Charter* raises obligation - Transcript unnecessary for judicial review applications given finality of Board decisions - Adoption of practice would interfere with expeditious and efficient resolution of labour relations disputes - Board exercising discretion to permit complainant to make unobtrusive personal recording subject to restrictions - Recording not official record and standing no higher than a party's notes for all purposes

KOHUT, JOHN; RE C.A.W., AND ITS LOCAL 303; RE GENERAL MOTORS OF CANADA LIMITED

1043

Practice and Procedure - Collective Agreement - Duty of Fair Representation - Unfair Labour Practice - Employee objecting to early termination of collective agreement - Employee arguing Board should not decide early termination application until his fair representation complaint had been dealt with - Employee objecting to union handling of vote on employer's last offer - Employer threatening to shut down all three plants if concession package not agreed to for all locations - Union totalling votes from all 3 locations and agreeing to accept package - Union making honest "hard choice" - Union not obliged to take vote on acceptance of employer offer or to follow employee wishes - Union affirming early termination - Fair representation complaint not concerned with "open period" and not seeking matter relevant to Board's discretion - Fair representation complaint need not be heard first - Complaint dismissed - Early termination decision affirmed

STELCO FASTENER & FORGING CO., STELCO INC.; RE U.S.W.A., LOCAL 3767 AND 3749; RE FRED J. ZICARD

339

Practice and Procedure - Colleges Collective Bargaining Act - Discharge - Unfair Labour Practice - Whether complainant theatre technician discharged because it was thought he was going to testify in the arbitration grievance filed by another employee - No reverse onus under CCBA - Complainant had to satisfy Board on balance of probabilities that there was no improper motive for the discharge - No part of motivation constituting breach of CCBA - Complaint dismissed

SENECA COLLEGE OF APPLIED ARTS AND TECHNOLOGY; RE O.P.S.E.U. AND ITS LOCAL 561 AND LESLIE CHARBON

(June)

Practice and Procedure - Construction Industry - Construction Industry Grievance - Evidence - Party seeking production of documents through a summons need not demonstrate any more than that the documents sought are arguably relevant to the matters at issue - Board not requiring immediate production of large volume of documents of uncertain relevance - Applicant free to pursue demands for any of these documents at a later point in proceedings where relevance and probative value established

ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, ONTARIO HYDRO; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL; RE I.U.O.E., LOCAL 793

(Sept.)

Practice and Procedure - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Grievance by respondent union alleging violation of subcontracting clause in collective agreement withdrawn - Whether Board having jurisdiction to continue to hear jurisdictional dispute where no one is requesting that the assignment of work be changed - Board excusing its discretion to not inquire further into jurisdictional dispute - Board's practice is not to embark upon inquiries into academic questions - Advance rulings inappropriate - Labour relations considerations favour not proceeding further

E.S. FOX LIMITED, PRO INSUL LIMITED, S.M.W., LOCAL 562; RE H.F.I.A., LOCAL 95; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP; RE MASTER INSULATORS' ASSOCIATION OF ONTARIO INC.

(May)

Practice and Procedure - Construction Industry - Evidence - Jurisdictional Dispute - Witness -

Board power to compel the production of documents and to determine its own practice and procedure includes the power to direct that documents be made available for cross-examination - Board emphasizing the need to minimize document-related adjournments - Board directing further witnesses to bring documents relating to their testimony - Board directing respondent counsel to provide witnesses with copy of decision

ACCO CANADIAN MATERIAL HANDLING, A DIVISION OF BABCOCK INDUSTRIES CANADA INC. AND IRONWORKERS DISTRICT COUNCIL OF ONTARIO AND B.S.O.I.W., LOCAL 700; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1244(Aug.)

819

Practice and Procedure - Construction Industry - Parties - Termination - Applications to terminate bargaining rights of unions in the ICI sector of the construction industry - All affiliated bargaining agents must be named as respondents and given notice of the applications - Matters adjourned until proper parties named and given notice

D-K CONSTRUCTION LTD.; RE ANGELO GANASSIN; RE C.J.A., LOCAL 785, AND THE ONTARIO PROVINCIAL COUNCIL; RE MICHAEL PARKER; RE L.I.U.N.A., LOCAL 1081, AND ONTARIO PROVINCIAL DISTRICT COUNCIL..... (May)

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Practice and Procedure - Duty of Fair Representation - Evidence - Complainants providing insufficient particulars - Board reviewing legal authority and labour relations rationale for provision of sufficient particulars in advance - Board explaining what particulars are and providing examples - Board distinguishing particulars from evidence - Board declining to dismiss complaint since delay not causing prejudice - Board directing complainants to provide sufficient particulars in writing

COALITION OF LAID-OFF WORKERS, THE, ONTARIO, CANADA. HEREINAFTER KNOWN AS THE C.L.W.; C.A.W., LOCALS 439 AND 458; RE VARTY CORPORATION

(Feb.)

Practice and Procedure - Duty of Fair Representation - Health and Safety - Unfair Labour Practice - Employer not proper party to fair representation complaint involving discharge, where justness of discharge determined in earlier Board proceeding under Section 24 of the *Occupational Health and Safety Act*

CHAPELLE, EVERETTE; RE A.T.U., LOCAL 113; RE TORONTO TRANSIT COMMISSION WHEEL TRANS DEPARTMENT..... (Dec.)

1238

Practice and Procedure - Duty of Fair Representation - Natural Justice - Settlement - Unfair Labour Practice - Complainants alleging union breached fair representation duty by agreeing to settlement of employer's severance pay obligations - Approximately three years passing between signing of settlement and filing of complaint - Board reluctant to allow litigation of complaints after such extreme delay, especially where matter complained of involves a settlement which has been executed and honoured, and when the effect of remedial relief sought is to nullify or rewrite the settlement - Complaint dismissed

COALITION OF LAID-OFF WORKERS, THE, ONTARIO, CANADA HEREINAFTER KNOWN AS THE C.L.W.; RE C.A.W., LOCALS 439 AND 458; RE VARTY CORPORATION

(Oct.)

Practice and Procedure - Duty of Fair Representation - Unfair Labour Practice - Motion by counsel for the complainants to have the Board remove counsel for the union on basis of conflict of interest - Argued that counsel for respondent had acted on behalf of the complainants on grievances and had received confidential information in that capacity - Whether Board has the jurisdiction to compel a party to change counsel - Board discussing jurisdiction over

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professional conduct of barristers and solicitors - Board declining to entertain motion on discretionary grounds	
WILSON, ANNA; RE O.P.S.E.U. AND O.P.S.E.U., LOCAL 110; RE FANSHAWE COLLEGE; RE ONTARIO COUNCIL OF REGENTS FOR THE COLLEGES OF APPLIED ARTS AND TECHNOLOGY	(Apr.)
Practice and Procedure - Employee Reference - Respondent complaining to Board about Labour Relations Officer designated to inquire into employee duties and responsibilities - Practice Note 4 establishing procedure for objections - Matters not specifically covered by Practice Note to be handled by analogy - Officer having discretion over proceedings within parameters of Practice Note and Board direction - Board ruling on complaint appropriate only after receipt of Officer's report and parties' submissions	481
MCINTYRE, WILF, FRED MIRON, ROLAND FRAYNE, NIELS HUSMAN, LARRY DUHAIME AND I.W.A. - CANADA, LOCAL 2693; RE PROSPER BRIZZARD, RICHARD BRIZZARD, ROBERT CASSON, RICHARD KOSKI, DAVID JAGGARD, MANFRED KRAUSE, ROBERT KRAUSE, DAVID ROSS, AULIUS TIITTO, DARRELL WESTOVER, RAYNARD JACOBSON, BRUCE NORDSTROM AND LARRY JAGGARD; RE GRAVEL AND LAKE SERVICES LIMITED	(Jan.)
Practice and Procedure - Employer Support - Evidence - Termination - Applicant's evidence raising possibility employees given time off work to sign termination petition - Scenario relevant to voluntariness and employer support - Board ordering employer to provide union with opportunity to review and photocopy time cards for all bargaining unit employees	64
BERTO'S RESTAURANT INC.; RE MARJORIE MEIGHAN; RE HOTEL MOTEL AND RESTAURANT EMPLOYEES UNION, LOCAL 442.....	(Jan.)
Practice and Procedure - Evidence - First Contract Arbitration - Board not admitting pleadings from unfair labour practice complaint involving same parties - First Contract arbitration concerned with fair and reasonable terms and not conduct of parties during negotiations or certification - Award should reflect terms parties would have reached had bargaining not broken down - Board assuming parties would make agreement comparable to others in same industry and geographic area - Board having regard to previous bargaining relationship and collective agreements between employer and another union - Board having regard to market conditions in unionized sector of industry in geographic area competition - Award making allowances for fact employer must compete with non-unionized operations - Award including retroactivity but not signing bonus	17
CANADA BUILDING MATERIALS COMPANY; RE TEAMSTERS UNION, LOCAL NO. 880	(Oct.)
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LUME MASONRY LTD.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GROUP OF EMPLOYEES; RE LUME CONSTRUCTION LIMITED.....(Aug.)

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Ratification and Strike Vote - Collective Agreement - Strike - Union taking employer's proposals for a collective agreement back to a membership meeting - Two units voting in favour of proposals - Union officers deciding proposals not acceptable - Members not crossing picket line of third unit - Whether collective agreement in force - No memorandum of settlement signed at last negotiating session - Votes conducted by union not ratification votes - No collective agreement based on principles of contract law - Board finding no collective agreement in place - Applications for directions concerning illegal strikes dismissed

PHOTO ENGRAVERS & ELECTROTYPEERS LIMITED, COUNCIL OF PRINTING INDUSTRIES OF CANADA ON BEHALF OF; RE G.C.I.U., LOCAL 500M (ROTO GRAVURE) AND THOSE PERSONS LISTED IN SCHEDULE "1" TO THE APPLICATION.....(Apr.)

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Reconsideration - Bargaining Unit - Certification - Construction Industry - Practice and Procedure - Applicant requesting variation of clarity note in earlier certification decision - Clarity note not part of unit description - Certificate issued subject to terms of Board decision, including any clarity note - Reconsideration denied

CONCRETE SYSTEMS, 799316 ONTARIO INC. C.O.B. AS; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL.....(Mar.)

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Reconsideration - Certification - Certification Where Act Contravened - Fraud - Employer requesting reconsideration of certification on grounds union failed to inform Board of material change in circumstances relevant to exercise of Board's discretion - Local union executive approved merger with other locals while certification application before Board - Members not notified or attending merger meeting - Union treating members as "members awaiting contract coverage" without full rights of active members, including right to vote on merger resolution - Employer alleging union's failure to inform Board of circumstances surrounding merger resolution constituting misrepresentation and fraud - Majority rejecting employer allegations - Information not material change or relevant to exercise of Board's discretion - Local union continuing in existence - Union members within statutory definition of term - Application dismissed

KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 206; RE GROUP OF EMPLOYEES.....(Feb.)

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Reconsideration - Certification - Construction Industry - Natural Justice - Practice and Procedure - Terminal Date - Employer requesting reconsideration of certifications on grounds employees failed to receive notice - Employer pleading own failure either to post Notice of Application or to file Return of Posting Card - Union filed Advice of Posting Card but did not fill in necessary information - Union filing Card after terminal date - Not unreasonable to expect union to act with promptness and diligence in checking posting where union asking Board to exercise discretion to certify without a hearing - Board directing matter to be listed for hearing representations on notice issues

VISSERS NURSERY; L.I.U.N.A., LOCAL 183.....(Sept.)

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of arbitration constituted - Business sold - New employer requesting Minister to appoint a conciliation officer - Whether Minister can appoint a conciliation officer even though an arbitration board has been established under HLDAA - Sale of a business provision does not preserve all the rights of a union as they stood at the time of sale - Board advising Minister that he is required to appoint a conciliation officer

TRILLIUM MANOR HOME FOR THE AGED, CORPORATION OF THE COUNTY OF SIMCOE; RE O.N.A.....(Apr.)

472

Related Employer - Bargaining Rights - Interference in Trade Unions - Remedies - Unfair Labour Practice - Complaint involving the transfer of work from Condor to Progressive and the resultant layoff of half the bargaining unit, the failure of Progressive to hire laid off Condor employees and letters to laid off employees - Condor bound by collective agreement with union with scope clause limited to Toronto - Progressive outside that geographic scope - Employer not breaching Act by not bargaining enhanced severance package with the union given the silence of the collective agreement on issue of severance entitlement and requirements of *Employment Standards Act* - No breach in failure to hire laid off Condor employees - Board declaring Condor and Progressive one employer but declining to exercise its discretion to extend scope clause in Condor's collective agreement to Progressive

PROGRESSIVE PACKAGING LIMITED, CONDOR LAMINATIONS, INNOPAC INC.; RE TORONTO TYPOGRAPHICAL UNION, NUMBER 91, PRINTING PUBLISHING AND MEDIA WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF NORTH AMERICA

(May)

Related Employer - Bargaining Unit - Certification - Construction Industry - Labourers' union seeking certification under provincial agreement for employees of related employer - Bricklayers' union already holding bargaining rights for bricklayers' assistants with related employer- Labourers' seeking bargaining unit description excluding bricklayers' assistants for whom other union holds bargaining rights - Certificate issuing

GOTTCOM CONTRACTORS LIMITED, GOTTARDO PROPERTIES LIMITED, GOTTARDO CONTRACTING (1980) INC., GOTTARDO CONTRACTING CO. LIMITED, GOTTARDO HOLDINGS COMPANY LTD., GOTTARDO MANAGEMENT LIMITED, AND GOTTARDO CORPORATION; RE L.I.U.N.A., LOCAL 506; RE B.M.I.U., LOCAL 1.....(Jan.)

25

Related Employer - Construction Industry - Employees of speciality contractor supervised by general contractor partially owned by same employer - "Control test" different in construction due to hiring hall requirements and to transitory nature of industry - Application dismissed

CENTURY STORE FIXTURES LTD., CENTURY INTERIORS LTD., JASPER CONSTRUCTION INC.; RE C.J.A., LOCAL 27.....(Nov.)

1119

Related Employer - Construction Industry - Evidence - Sale of a Business - No one appearing for respondent companies at hearing - Act requiring respondent to adduce all material facts relevant to application, but not altering legal burden of proof - Where applicant union chooses to proceed in absence of respondents rather than enforce attendance, union must still adduce some evidence to support findings necessary to successful application - Absence of information particularly within knowledge of respondents should not stand in way of success - Board assessing evidence accordingly - Declaration issuing

DELTA ELECTRIC EASTERN LIMITED, DELTA ELECTRICAL & MECHANICAL INC., DELTA ELECTRICAL & MECHANICAL LIMITED AND DELTA ELECTRIC LTD.; RE I.B.E.W., LOCAL 353

(Dec.)

Related Employer - Construction Industry - Five corporations carrying on related activities -

Whether Board should exercise its discretion to treat them as one employer - One of five corporations evincing willingness to revive other four dormant corporations to defeat bargaining rights of Carpenters Union with respect to the residential sector - Board making one employer declaration to protect those bargaining rights from erosion

TACTIX CONSTRUCTION LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183

467

Related Employer - Construction Industry - Individual owning and operating small acoustic and drywall company in commercial and residential sectors in southwestern Ontario until company dissolution in 1981 - Same individual buying into and operating similar drywall company in same area from 1987 onward - Individual was "key man" in expertise and experience in each case - Six year gap no compelling reason for Board to decline related employer declaration - Declaration issuing

KENT ACOUSTICS LIMITED, CITY ACOUSTICS LIMITED, J.L. ACOUSTICS LTD.; RE C.J.A., LOCAL 494.....

(Aug.)

Related Employer - Construction Industry - Remedies - Landmark Contracting building and erecting silos pursuant to collective agreement with Ironworkers - Landmark Structures erecting elevated water tanks - Pre-conditions required for a one employer declaration admitted - Board declining to exercise its discretion to make a one employer declaration - No erosion of union's bargaining rights

LANDMARK CONTRACTING LTD. AND LANDMARK STRUCTURES (ONTARIO) LTD.; RE B.S.O.I.W., LOCAL 721

(June)

Related Employer - Construction Industry - Sale of a Business - Owner of defunct company obtaining ownership interest in existing business - No sale of business - No accompanying expertise or active participation such as to make him "key man" in existing business - Related employer declaration inappropriate - Applications dismissed

YOLA CONSTRUCTION LTD. AND K & Z CONSTRUCTION LTD.; RE L.I.U.N.A., LOCAL 506; RE B.A.C., LOCAL 2

(Mar.)

Related Employer - Construction Industry - Union having actual knowledge that companies were under common control and direction at least several years before filing application - Union having actual knowledge of loss of job opportunities and that work covered by its collective agreement was being performed by a related employer not bound to that agreement - Union delay causing respondents prejudice and affecting right of unrepresented employees to seek own bargaining agent or remain unrepresented - Application dismissed

ANDREYNOLDS COMPANY LIMITED AND BILL BAILEY OF BELLEVILLE LIMITED; RE U.A., LOCAL 463

(Nov.)

Related Employer - Cronkwright truckload carrier contracting out shunt service to Horton for eight years with no objection from union - Cronkwright ending contract and contracting work to a related company Erie - Respondents Cronkwright and Erie admitting essential ingredients for a one employer declaration but arguing Board should exercise its discretion to refuse declaration - Board making declaration - Potential erosion of union's bargaining rights - Cronkwright cannot avoid consequences flowing from doing work directly by entering into an arrangement with a related employer

CRONKWRIGHT TRANSPORT LIMITED, ERIE EMPLOYEE SERVICES LTD.; RE TEAMSTERS' UNION, LOCAL 879.....

(July)

Related Employer - Judicial Review - Union seeking declaration that the Ontario Legal Aid Plan is a common employer with three community legal clinics - Clinics independent of OLAP but are funded by it and are accountable for the proper use of public funds - OLAP found to be engaged in related activities - Common control criteria met because OLAP influenced

the management of the clinics - Board exercising discretion to make one employer declaration with respect to two clinics where OLAP had so involved itself in the affairs of the clinics that to ensure meaningful collective bargaining the union needed to be able to negotiate with OLAP - Employer seeking judicial review of decision on grounds Board ignored regulation for establishment and funding of clinics - Board finding of "intervention" in management and operation of clinics by personnel of applicant not unreasonable - Board not obliged to interpret and apply other legislation after threshold finding of "intervention" under related employer provision of *Labour Relations Act* - Board obliged to consider only labour relations aspects of clinics and not legal services aspect of their operations - Application dismissed

ONTARIO LEGAL AID PLAN, THE; RE ONTARIO PUBLIC SERVICE EMPLOYEES UNION, ONTARIO LABOUR RELATIONS BOARD, NEIGHBOURHOOD LEGAL SERVICES, INJURED WORKERS' CONSULTANTS, TENANT HOTLINE INC. AND COMMUNITY LEGAL EDUCATION ONTARIO.....(Jan.)

118

Related Employer - Sale of a Business - Fashion tailoring business transferred as functional entity - Original employer continuing to exist as contracting company - Sale of business declaration issuing

BRISTON FASHIONS INC. AND JAY GARMENT MANUFACTURING CO. LTD.; RE I.L.G.W.U. AND ONTARIO CLOAKMAKERS, DRESS AND SPORTSWEAR DISTRICT COUNCIL OF I.L.G.W.U.(Mar.)

223

Religious Exemption - Applicant opposed certification because no vote held and because he believed it created workplace disharmony - Applicant objecting to potential use of union dues for non-collective bargaining purposes -Applicant objecting as Christian to union defiance of company through strikes or negotiation pressure - Applicant signing union membership card on mistaken belief he would have to join union - Board not satisfied that objection to paying dues motivated by religious beliefs - Objection to paying dues based on dissatisfaction with certification process and nature of union representation - Application dismissed

GILMORE, GLEN A; Re C.A.W. T.C.A.; RE JOHN DEERE WELLAND WORKS.....(Feb.)

157

Religious Exemption - Practice and Procedure - Timeliness - Application for exemption from union dues - No collective agreement in force yet between trade union and employer - Board having no jurisdiction - Application premature - Board not willing to give hypothetical response to possible future circumstances

LIEDEMAN, DOREEN; RE C.U.P.E.; RE VAUGHAN PUBLIC LIBRARIES ..(Apr.)

429

Remedies - Bargaining Rights - Interference in Trade Unions - Related Employer - Unfair Labour Practice - Complaint involving the transfer of work from Condor to Progressive and the resultant layoff of half the bargaining unit, the failure of Progressive to hire laid off Condor employees and letters to laid off employees - Condor bound by collective agreement with union with scope clause limited to Toronto - Progressive outside that geographic scope -Employer not breaching Act by not bargaining enhanced severance package with the union given the silence of the collective agreement on issue of severance entitlement and requirements of *Employment Standards Act* - No breach in failure to hire laid off Condor employees - Board declaring Condor and Progressive one employer but declining to exercise its discretion to extend scope clause in Condor's collective agreement to Progressive

PROGRESSIVE PACKAGING LIMITED, CONDOR LAMINATIONS, INNOPAC INC.; RE TORONTO TYPOGRAPHICAL UNION, NUMBER 91, PRINTING PUBLISHING AND MEDIA WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF NORTH AMERICA

(May)

Remedies - Construction Industry - Health and Safety - Picketing - Strike - Board asked to declare that respondent employees had engaged in an unlawful strike by refusing to cross picket line established by another union - Argued that employees did not cross picket line because they believed it would be dangerous to do so - Picket line tension runs high but actual violence is rare - Board finding nothing in facts which would justify employees' refusal - Declaration of unlawful strike and direction to cease engaging in unlawful activity issuing

HORTON CBI, LIMITED; RE LEO E. EVANS, JOE L. DA SILVA, TERRANCE R. MCGUIRE, AND SANFORD JONES; RE B.B.F., LOCAL 128

648

Remedies - Construction Industry - Related Employer - Landmark Contracting building and erecting silos pursuant to collective agreement with Ironworkers - Landmark Structures erecting elevated water tanks - Pre-conditions required for a one employer declaration admitted - Board declining to exercise its discretion to make a one employer declaration - No erosion of union's bargaining rights

LANDMARK CONTRACTING LTD. AND LANDMARK STRUCTURES (ONTARIO) LTD.; RE B.S.O.I.W., LOCAL 721

660

Remedies - Construction Industry Grievance - Damages - Judicial Review - Board decision that failure to hold mark-up was a breach of the collective agreement was not patently unreasonable - Assessment of damages not unreasonable - Application dismissed

ONTARIO HYDRO AND ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO SHEET METAL WORKERS' AND U.A. AND THE O.L.R.B.....

1204

Remedies - Damages - Discharge - Health and Safety - Complainant was suddenly dismissed for tardiness after speaking to a Health and Safety Inspector - Complainant had a genuine tardiness problem but had not hitherto been disciplined or warned of discharge - Circumstances leading to inference of employer "anti-safety animus" - Complainant seeking monetary compensation only - Complainant was in jeopardy of discharge for tardiness and was already looking for other work - Remedy not meant as winfall - Board awarding \$4,500 damages

RAMJIT, BO; RE MANUEL PUCHE.....

(Aug.)

Remedies - Damages - Duty of Fair Representation - Unfair Labour Practice - Union settling discharge grievance at arbitration - Complainant not adequately advised of terms of settlement requiring her to present herself to work by specified date or her grievance would be dismissed - Breach of fair representation duty - Failure to advise employee of settlement terms which cause employee to fail to comply leading to dismissal of grievance found to be arbitrary conduct - Damages for loss of opportunity - Quantum to be worked out by parties

DENEAU, RHONDA; RE G.M.P, LOCAL #49; RE MULTI-FITTINGS

(Apr.)

Remedies - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Judicial Review - Lockout - Stay - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's nego-

tiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees - Employer bringing application for a stay of the Board's decision pending the hearing of its application for judicial review - Stay application dismissed by High Court

PLAZA FIBREGLAS MANUFACTURING LTD., PLAZA ELECTROPLATING LTD., CITCOR MANUFACTURING LTD. AND SABINA CITRON; RE ONTARIO LABOUR RELATIONS BOARD AND U.S.W.A..... (June)

747

Remedies - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Lockout - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches, to pay union's negotiating costs, to return work to original company and make no further movement without disclosure to union, to provide union with names and addresses of bargaining unit employees as of lockout date, and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees

PLAZA FIBERGLAS MANUFACTURING LIMITED AND PLAZA ELECTRO-PLATING LTD., CITCOR MANUFACTURING LTD., AND SABINA CITRON; RE U.S.W.A..... (Feb.)

192

Remedies - Discharge - Health and Safety - Occupational health nurse fired after refusing to return to the employer the keys to the filing cabinet holding employee health records - Whether discharge was for insubordination or acting in compliance with OHSA in protecting the confidentiality of employee health records - Nurse found to be genuinely motivated by a health and safety concern - Board not making positive finding that there is a duty under OHSA with which nurse was complying - Board finding it appropriate to review penalty imposed whether OHSA violated or not - All record of discharge to be removed from file - Written warning substituted for discharge

BILT-RITE UPHOLSTERING CO. LTD.; RE JUDY BARRY (July)

755

Remedies - Judicial Review - Practice and Procedure - Stay - Union letter to Board alleging employer not complying with Board order - Union seeking filing of Board order with Court for enforcement - Employer letter to Board arguing enforcement proceedings inappropriate while appeal on jurisdictional issue still before courts - Employer letter satisfying Board of non-compliance - Union entitled to enforcement in absence of Court stay, even if appeal or judicial review in progress - Board dispensing with non-compliance hearing and directing filing of decision with Court

SACO FISHERIES LIMITED; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION..... (Feb.)

217

Remedies - Strike - Employer seeking relief against illegal strike long after cessation of activity complained of - Board not prepared to grant relief under circumstances

NORTHFIELD METAL PRODUCTS LTD.; RE G.M.P.,
(A.F.L.-C.I.O.-C.L.C.)..... 939

Representation Vote - Bargaining Rights - Evidence - Termination - Voluntary Recognition - Termination application brought within first year of voluntary recognition - Majority support in union cards signed at time of recognition is sufficient evidence to create a rebuttable presumption of union entitlement to representation - Act not anticipating representation vote except where there is uncertainty of employee wishes at the time of recognition agreement - Board declining to hold vote and dismissing application

CEDARVALE WOODWORKING LIMITED; RE ANTONIO BERTUCCI; RE C.J.A., LOCAL 27..... 836
(Aug.)

Representation Vote - Build-Up - Certification - Interference in Trade Unions - Intimidation and Coercion - Membership Evidence - Petition - Unfair Labour Practice - Whether Board should order a vote to be conducted in the future - Employer having no firm plans for build-up as of the application date nor was build-up of the magnitude that would lead the Board to order and defer a vote - Employer alleging that misconduct by employee organizing committee made union's membership evidence unreliable - Misconduct alleged to have occurred including intimidation of petitioners - Conduct of employee organizers not leading Board to order vote - Employer found to have breached Act by questioning employees about their support for the union - Certificate issuing

GSW INC. C.O.B. AS GSW HEATING PRODUCTS DIVISION; RE U.S.W.A.; RE GROUP OF EMPLOYEES (May) 535

Representation Vote - Certification - Intimidation and Coercion - Unfair Labour Practice - Intimidatory statements made by one employee to another during an organizing campaign - Statements not made by a collector or on behalf of the union - Peer pressure during organizing drive not relevant to reliability of membership evidence - Board will not order a representation vote where a statement about union dues is made by a rank and file employee - Certificate issuing

NATIONAL NEWS COMPANY LIMITED; RE TEAMSTERS UNION, LOCAL 91; RE GROUP OF EMPLOYEES (Aug.) 870

Representation Vote - Certification - Natural Justice - Employer unable to post Notice to Employees of vote result until day before time fixed for objections - Board ordering posting of decision extending time for objection

CARLETON ROMAN CATHOLIC SEPARATE SCHOOL BOARD; RE C.U.P.E.; RE GROUP OF EMPLOYEES (Jan.) 19

Representation Vote - Certification - Natural Justice - Practice and Procedure - Employer failing to post Form 70 with Officer's Report until terminal date - Board directing employer to post decision of Board notifying employees of right to make representation on vote or report - Certificate to issue if no representations received within fifteen days

SAINT LUKE'S PLACE; RE S.E.I.U., LOCAL 204 AFFILIATED WITH S.E.I.U., A.F. OF L., C.I.O., C.L.C..... (Dec.) 1333

Representation Vote - Termination - Practice and Procedure - Reconsideration - Union requesting reconsideration of order for representation vote - Union alleging employer gerrymandered voter list - Allegations, even if true, irrelevant to Board's determination - Adequate

protection against gerrymandering through segregated ballot process -Application dismissed

OTTAWA GREENBELT CONSTRUCTION LIMITED; RE UBALDO MARCHESCHI ON HIS OWN BEHALF AND ON BEHALF OF A GROUP OF EMPLOYEES; RE I.U.O.E., LOCAL 793.....(Dec.)

1311

Sale of a Business - Conciliation - Hospital Labour Disputes Arbitration Act - Reference - Board of arbitration constituted - Business sold - New employer requesting Minister to appoint a conciliation officer - Whether Minister can appoint a conciliation officer even though an arbitration board has been established under HLDAA - Sale of a business provision does not preserve all the rights of a union as they stood at the time of sale - Board advising Minister that he is required to appoint a conciliation officer

TRILLIUM MANOR HOME FOR THE AGED, CORPORATION OF THE COUNTY OF SIMCOE; RE O.N.A.....(Apr.)

472

Sale of a Business - Construction Industry - Evidence - Related Employer - No one appearing for respondent companies at hearing - Act requiring respondent to adduce all material facts relevant to application, but not altering legal burden of proof - Where applicant union chooses to proceed in absence of respondents rather than enforce attendance, union must still adduce some evidence to support findings necessary to successful application - Absence of information particularly within knowledge of respondents should not stand in way of success - Board assessing evidence accordingly - Declaration issuing

DELTA ELECTRIC EASTERN LIMITED, DELTA ELECTRICAL & MECHANICAL INC., DELTA ELECTRICAL & MECHANICAL LIMITED AND DELTA ELECTRIC LTD.; RE I.B.E.W., LOCAL 353

(Dec.)

Sale of a Business - Construction Industry - Related Employer - Owner of defunct company obtaining ownership interest in existing business - No sale of business - No accompanying expertise or active participation such as to make him "key man" in existing business - Related employer declaration inappropriate - Applications dismissed

YOLA CONSTRUCTION LTD. AND K & Z CONSTRUCTION LTD.; RE L.I.U.N.A., LOCAL 506; RE B.A.C., LOCAL 2

(Mar.)

Sale of a Business - Construction Industry - Small electrical contracting business voluntarily recognizing union to obtain journeymen and apprentice electricians - Business failed to obtain any such tradesmen from union and at no time employed anyone other than its sole owner - Owner closing business and becoming partner in another electrical contracting business - Owner selling all assets to new business and receiving additional payment in recognition of experience - New business acquiring benefit of proprietary skills in bid-oriented business - Fact that former business was one person business and unable to get expected tradesmen under collective agreement no reason to refuse sale of business declaration - Circumstances warranting protection of bargaining rights union acquired under voluntary recognition with former business - Board finding sale of business

DELUXE ELECTRICAL CONTRACTOR LTD., DUPLEX ELECTRICAL LTD.; RE I.B.E.W., LOCAL 353

(Nov.)

Sale of a Business - Related Employer - Fashion tailoring business transferred as functional entity - Original employer continuing to exist as contracting company - Sale of business declaration issuing

BRISTON FASHIONS INC. AND JAY GARMENT MANUFACTURING CO. LTD.; RE I.L.G.W.U. AND ONTARIO CLOAKMAKERS, DRESS AND SPORTSWEAR DISTRICT COUNCIL OF I.L.G.W.U.....(Mar.)

223

Sale of a Business - Steinberg leasing store in mall - Owner of mall taking over lease and chattels -

Ethnic supermarket leasing premises from owner and buying unwanted chattels - Whether sale of a business from Steinberg to ethnic supermarket - Ethnic supermarket's food business not a continuation of the business formerly operated by Steinberg but an expansion of a pre-existing retail food business - Application dismissed	
STEINBERG INC., MIRACLE FOOD MART, A DIVISION OF, AND 722686 ONTARIO LIMITED, C.O.B. FERLISI SUPERMARKETS; RE U.F.C.W., LOCALS 175 & 633	794
School Boards and Teachers Collective Negotiations Act - Bargaining Unit - Certification - Union seeking a unit of occasional teachers only - School Board arguing unit should also include supply instructors - Board finding unit of occasional teachers only to be appropriate	
HASTINGS COUNTY BOARD OF EDUCATION, THE; RE O.S.S.T.F.	(May) 560
School Boards and Teachers Collective Negotiations Act - Bargaining Unit - Certification - Union seeking to represent a group of instructors teaching particular courses while employer arguing appropriate unit should encompass all continuing education instructors, regardless of courses taught - Employer's description appropriate - Board also not departing from its usual "30/30" rule in determining who is an employee - Board not finding it appropriate to sub-divide the instructor group on the basis of number of courses taught or number of teaching hours	
WINDSOR, THE BOARD OF EDUCATION FOR THE CITY OF; RE O.S.S.T.F.	(July) 815
Sector Determination - Construction Industry - Construction Industry Grievance - Whether the construction of a highrise senior citizens home is a project falling within the ICI sector of the construction industry - Rooms not self-contained apartment units - Residents receiving daily care from nursing staff - Project found to be within ICI sector - Supplier of drywall offloading, conveying and stockpiling drywall with own employees - Supplier not having collective agreement with applicant union - In circumstances of case delivery of drywall not construction work and not covered by ICI agreement - Grievance alleging violation of subcontracting clause in ICI agreement dismissed	
FOUR SEASONS DRYWALL; RE L.I.U.N.A., LOCAL 506.....	(May) 525
Sector Determination - Construction Industry - Whether retirement home project falling within ICI or residential sector - Matter turning on degree of direct control over unit by resident - Project falling under ICI sector	
FUTURE CARE LIMITED AND KUCO CONSTRUCTION LIMITED; RE L.I.U.N.A., LOCAL 1036	(Aug.) 844
Settlement - Bargaining Unit - Construction Industry - Termination - Union agreeing on basis of information provided by employer that there was a single employee in the bargaining unit - Union later disputing this information - No allegation of fraud - Allowing union to resile from agreement as reflected in Officer's Report would undermine integrity of Board process and fundamental role of Labour Relations Officers	
LORNE'S ELECTRIC - 291360 ONTARIO LTD.; RE KLAUS WILLROIDER; RE I.B.E.W., I.B.E.W. CONSTRUCTION COUNCIL OF ONTARIO, I.B.E.W., LOCALS 105, 115, 120, 303, 353, 402, 530, 586, 773, 804, 894, 1687, AND 1739.....	(Sept.) 935
Settlement - Duty of Fair Representation - Natural Justice - Practice and Procedure - Unfair Labour Practice - Complainants alleging union breached fair representation duty by agreeing to settlement of employer's severance pay obligations - Approximately three years passing between signing of settlement and filing of complaint - Board reluctant to allow litigation of complaints after such extreme delay, especially where matter complained of involves	

a settlement which has been executed and honoured, and when the effect of remedial relief sought is to nullify or rewrite the settlement - Complaint dismissed

COALITION OF LAID-OFF WORKERS, THE, ONTARIO, CANADA HEREINAFTER KNOWN AS THE C.L.W.; RE C.A.W., LOCALS 439 AND 458; RE VARTY CORPORATION

(Oct.)

Settlement - Duty of Fair Representation - Unfair Labour Practice - Complainant registered nurse terminated after he refused to submit to a psychiatric examination - Arbitration of complainant's grievance scheduled but settlement reached beforehand - Complainant signing settlement - Complainant arguing before Board that he was under improper pressure to accept settlement and its terms were unfair - Fair representation complaint against union dismissed

LEONARD, DENNIS; RE O.N.A.; RE MOUNT SINAI HOSPITAL

(May)

Settlement - Evidence - Practice and Procedure - Privilege - Witness - Employer alleging it agreed to a settlement because it mistakenly believed the union would provide certain assurances - Assurances not incorporated into settlement document - Employer seeking to adduce evidence of settlement discussions with Board officer and union - Board denying consent to hear such evidence as to do so would undermine the settlement process and the impartiality of Board officers

LUME MASONRY LTD.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GROUP OF EMPLOYEES; RE LUME CONSTRUCTION LIMITED.....

(Aug.)

Settlement - Parties - Practice and Procedure - Reconsideration - Complainant making second reconsideration request on basis that mental illness had deprived him of the capacity to make a settlement - Board directing matter be scheduled for hearing to allow complainant to show why earlier decision permitting withdrawal of complaint should be reconsidered

DORLING, DOUGLAS; RE O.P.S.E.U. (JAMES CLANCY) AND O.P.S.E.U. (MS. SHERRY CURRIE).....

(Sept.)

Stay - Adjournment - Collective Agreement - First Contract Arbitration - Interest Arbitration - Judicial Review - Practice and Procedure - Employer and termination applicant requesting that Board adjourn its hearings to arbitrate the settlement of a first collective agreement pending a stay and judicial review application in the courts - Adjournment denied - Board proceeding with hearings in absence of employer - Board amending significant number of articles in union's proposed collective agreement to reflect what should reasonably be contained in a first collective agreement - Board deleting paid education leave, COLA and pension plan provisions

VENTURE INDUSTRIES CANADA, LTD.; RE C.A.W.

(July)

Stay - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Judicial Review - Lockout - Remedies - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs - Board ordering employer to return work to original company and make no

further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees - Employer bringing application for a stay of the Board's decision pending the hearing of its application for judicial review - Stay application dismissed by High Court

PLAZA FIBREGLAS MANUFACTURING LTD., PLAZA ELECTROPLATING LTD., CITCOR MANUFACTURING LTD. AND SABINA CITRON; RE ONTARIO LABOUR RELATIONS BOARD AND U.S.W.A.....(June)

747

Stay - First Contract Arbitration - Judicial Review - Practice and Procedure - Termination - Application for termination of union's bargaining rights filed before panel hearing first contract application issued its decision - Termination application not reaching panel before panel issued its decision directing the settlement of a first collective agreement by arbitration - Board determining appropriate order in which the two applications to be considered in the context of a reconsideration application - Sound labour relations considerations leading Board to consider first contract application first - Termination application dismissed - Termination applicant requesting leave of High Court to bring an application for judicial review in the High Court, an order setting aside Board decisions and a stay of the Board's further hearings to settle the first collective agreement - High Court denying leave - Judicial review application transferred to Divisional Court - Request for stay denied

VENTURE INDUSTRIES CANADA LIMITED, C.A.W. AND ONTARIO LABOUR RELATIONS BOARD; RE RANDY BURKE.....(June)

749

Stay - Judicial Review - Practice and Procedure - Remedies - Union letter to Board alleging employer not complying with Board order - Union seeking filing of Board order with Court for enforcement - Employer letter to Board arguing enforcement proceedings inappropriate while appeal on jurisdictional issue still before courts - Employer letter satisfying Board of non-compliance - Union entitled to enforcement in absence of Court stay, even if appeal or judicial review in progress - Board dispensing with non-compliance hearing and directing filing of decision with Court

SACO FISHERIES LIMITED; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION.....(Feb.)

217

Strike - Collective Agreement - Ratification and Strike Vote - Union taking employer's proposals for a collective agreement back to a membership meeting - Two units voting in favour of proposals - Union officers deciding proposals not acceptable - Members not crossing picket line of third unit - Whether collective agreement in force - No memorandum of settlement signed at last negotiating session - Votes conducted by union not ratification votes - No collective agreement based on principles of contract law - Board finding no collective agreement in place - Applications for directions concerning illegal strikes dismissed

PHOTO ENGRAVERS & ELECTROTYPERS LIMITED, COUNCIL OF PRINTING INDUSTRIES OF CANADA ON BEHALF OF; RE G.C.I.U., LOCAL 500M (ROTO GRAVURE) AND THOSE PERSONS LISTED IN SCHEDULE "1" TO THE APPLICATION.....(Apr.)

430

Strike - Construction Industry - Health and Safety - Picketing - Remedies - Board asked to declare that respondent employees had engaged in an unlawful strike by refusing to cross picket line established by another union - Argued that employees did not cross picket line because they believed it would be dangerous to do so - Picket line tension runs high but actual violence is rare - Board finding nothing in facts which would justify employees'

refusal - Declaration of unlawful strike and direction to cease engaging in unlawful activity issuing		
HORTON CBI, LIMITED; RE LEO E. EVANS, JOE L. DA SILVA, TERRANCE R. MCGUIRE, AND SANFORD JONES; RE B.B.F., LOCAL 128	(June)	648
Strike - Construction Industry - Health and Safety - Unfair Labour Practice - Employer requiring all employees to wear bellyhooks, whether or not needed in work - Employees believing bellyhooks unsafe and refusing to wear as way of demonstrating refusal to use under any circumstances - Employer refusing to assign work to employees refusing to wear bellyhooks - Employer seeking illegal strike declaration and damages - Employees alleging reprisal contrary to <i>Occupational Health and Safety Act</i> - Refusal not justified under <i>Occupational Health and Safety Act</i> since mere wearing of bellyhooks not alleged to endanger - No refusal to work since no work assigned - Complaints and application dismissed		
GILBERT STEEL LIMITED; RE B.S.O.I.W. LOCAL 721, GEORGE JONCAS, ALFIE THOMAS, AND AARON MURPHY ON THEIR OWN BEHALF AND ON BEHALF OF THE RESPONDENT UNION; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, ONTARIO HYDRO RE B.S.O.I.W., LOCAL 721, ON BEHALF OF ITS REINFORCING RODMEN NAMED IN SCHEDULE "B" TO THE COMPLAINT; RE B.S.O.I.W., LOCAL 721, GEORGE JONCAS, ALFIE THOMAS, JOHN DONALDSON AND AARON MURPHY	(Feb.)	136
Strike - Duty of Fair Representation - Unfair Labour Practice - Union's refusal to provide "strike pay" to a member is an internal matter which does not involve the representation of a bargaining unit employee in relation to employer - Complaint not under Board's jurisdiction to deal with fair representation complaints - Complaint dismissed		
GAUTHIER, IRENE; RE I.W.A. - CANADA, LOCAL 1-1000.....	(Oct.)	1041
Strike - Final Offer Vote - Employer alleging union engaging in illegal strike by refusing to sign collective agreement reflecting employer's "final offer" - Union challenging Board's jurisdiction to deal with voter eligibility issues arising out of final offer votes - Union arguing only Minister has this authority - Board asserting jurisdiction - Act silent on disposition of final offer vote issues - Two-step approach of Minister determining vote and Board then determining complaint under Act would result in multiple proceedings and delay - Minister having no adjudicative powers under Act - Board jurisdiction consistent with its adjudicative powers and general structure of Act		
GRAVEL AND LAKE SERVICES LIMITED; RE ROLAND FRAYNE, NEILS HUSMAN AND LARRY DUHAIME; RE PROSPER BRIZZARD, RICHARD BRIZZARD, ROBERT CASSON, RICHARD KOSKI, DAVID JAGGARD, MANFRED KRAUSE, ROBERT KRAUSE; DAVID ROSS, AULIUS TIITTO, DARRELL WESTOVER, RAYNARD JACOBSON, BRUCE NORDSTROM AND LARRY JAGGARD; RE WILF MCINTYRE, FRED MIRON AND I.W.A. - CANADA, LOCAL 2693.....	(Mar.)	262
Strike - Intimidation and Coercion - Unfair Labour Practice - Collective agreement permitting inspectors to maintain union membership and departmental seniority rights on return to bargaining unit, provided they maintained union membership - Inspectors threatened with expulsion by union if they performed bargaining unit work during strike - Expulsions carried out - Employer arguing union counselled illegal strike and penalized inspectors for failure to participate in illegal strike - Refusal by inspectors to work would not have been "strike" by "employees" within meaning of Act - Illegal strike provisions of Act inapplicable - No intimidation or coercion - Act giving only limited rights to managerial personnel -		

Statutory provision making agreement binding on employer and union not creating rights under Act for managerial personnel - Complaint dismissed	
TORONTO TRANSIT COMMISSION; RE A.T.U., LOCAL 113; RE WILLIAM L. FRANCO ET AL.....	1346
Strike - Judicial Review - Union members refusing to perform "struck work" - Members of a sister local lawfully locked out by their employer - Collective agreement not requiring employees to handle "struck work" - Whether sympathetic strike contrary to Act - Work refusal properly characterized as a strike - Board issuing direction which may have an educational effect in the printing industry where "struck work" clauses are common - Divisional Court upholding Board decision - Application dismissed	
EMPRESS GRAPHICS INC., COUNCIL OF PRINTING INDUSTRIES OF CANADA ON BEHALF OF, AND ONTARIO LABOUR RELATIONS BOARD; RE G.C.I.U., LOCAL 500M	396
Strike - Remedies - Employer seeking relief against illegal strike long after cessation of activity complained of - Board not prepared to grant relief under circumstances	
NORTHFIELD METAL PRODUCTS LTD.; RE G.M.P., (A.F.L.-C.I.O.-C.L.C.).....	939
Terminal Date - Certification - Construction Industry - Natural Justice - Practice and procedure - Reconsideration - Employer requesting reconsideration of certifications on grounds employees failed to receive notice - Employer pleading own failure either to post Notice of Application or to file Return of Posting Card - Union filed Advice of Posting Card but did not fill in necessary information - Union filing Card after terminal date - Not unreasonable to expect union to act with promptness and diligence in checking posting where union asking Board to exercise discretion to certify without a hearing - Board directing matter to be listed for hearing representations on notice issues	
VISSERS NURSERY; RE L.I.U.N.A., LOCAL 183	989
Termination - Bargaining Rights - Evidence - Representation Vote - Voluntary Recognition - Termination application brought within first year of voluntary recognition - Majority support in union cards signed at time of recognition is sufficient evidence to create a rebuttable presumption of union entitlement to representation - Act not anticipating representation vote except where there is uncertainty of employee wishes at the time of recognition agreement - Board declining to hold vote and dismissing application	
CEDARVALE WOODWORKING LIMITED; RE ANTONIO BERTUCCI; RE C.J.A., LOCAL 27.....	836
Termination - Bargaining Unit - Construction Industry - Settlement - Union agreeing on basis of information provided by employer that there was a single employee in the bargaining unit - Union later disputing this information - No allegation of fraud - Allowing union to resile from agreement as reflected in Officer's Report would undermine integrity of Board process and fundamental role of Labour Relations Officers	
LORNE'S ELECTRIC - 291360 ONTARIO LTD.; RE KLAUS WILLROIDER; RE I.B.E.W., I.B.E.W. CONSTRUCTION COUNCIL OF ONTARIO, I.B.E.W., LOCALS 105, 115, 120, 303, 353, 402, 530, 586, 773, 804, 894, 1687, AND 1739.....	935
Termination - Certification - Petition - Practice and Procedure - Applicant employee was petitioner in earlier certification proceeding - Whether Board discretion "to bar an unsuccessful applicant for any period from the date of the dismissal of the unsuccessful application" applies to unsuccessful petitioner bringing termination application - Act requiring Board to	

entertain timely termination application - Certification not prior "unsuccessful application"		
- Vote directed		
INZOLA CONSTRUCTION (1976) LIMITED; RE CALOGERO MATTINA; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL ON BEHALF OF ITS AFFILIATED LOCAL UNIONS 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081 AND 1089.....	(Dec.)	1293
Termination - Collective Agreement - Union and employer applying for early termination of agreement - Early termination would shorten "open period" - Rival union conducting displacement campaign and objecting to early termination - Board unwilling to grant early termination where effect would be shortening of "open period" - Application dismissed		
RIDGEWOOD INDUSTRIES; RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE PROFESSIONAL AND TECHNICAL EMPLOYEES INTERNATIONAL UNION, LOCAL 351; RE U.S.W.A. AND OBJECTING EMPLOYEES.....	(Mar.)	331
Termination - Construction Industry - Parties - Practice and Procedure - Applications to terminate bargaining rights of unions in the ICI sector of the construction industry - All affiliated bargaining agents must be named as respondents and given notice of the applications - Matters adjourned until proper parties named and given notice		
D-K CONSTRUCTION LTD.; RE ANGELO GANASSIN; RE C.J.A., LOCAL 785, AND THE ONTARIO PROVINCIAL COUNCIL; RE MICHAEL PARKER; RE L.I.U.N.A., LOCAL 1081, AND ONTARIO PROVINCIAL DISTRICT COUNCIL.....	(May)	503
Termination - Construction Industry - Union arguing application should be dismissed because four of five employees at work on application date were recalled contrary to collective agreement and therefore unlawfully at work - Employees not referred to union hall before recall - Employer not altering layoff and recall procedure - No evidence of union ever grievance failure to refer to union before recall - Same five employees would have been at work on application date whether or not agreement complied with - Employer not manipulating recall to assist termination application - Board directing representation vote		
OTTAWA GREENBELT CONSTRUCTION LIMITED; RE UBALDO MARCHESCI ON HIS OWN BEHALF AND ON BEHALF OF A GROUP OF EMPLOYEES; RE I.U.O.E., LOCAL 793.....	(Nov.)	1143
Termination - Employer Support - Evidence - Practice and Procedure - Applicant's evidence raising possibility employees given time off work to sign termination petition - Scenario relevant to voluntariness and employer support - Board ordering employer to provide union with opportunity to review and photocopy time cards for all bargaining unit employees		
BERTO'S RESTAURANT INC.; RE MARJORIE MEIGHAN; RE HOTEL MOTEL AND RESTAURANT EMPLOYEES UNION, LOCAL 442.....	(Jan.)	17
Termination - Evidence - Petition - Inadequate first hand evidence of origination and preparation of petition - Gaps in evidence of custody - Incomplete evidence on circulation of petition and circumstances surrounding each signature - Evidence inconsistent - Board unable to accept petition as voluntary expression of employee wishes - Application dismissed		
HULLY GULLY LONDON LTD.; RE RONALD GARY EMMONS; RE R.W.D.S.U., AFL, CIO, CLC	(Feb.)	160
Termination - First Contract Arbitration - Judicial Review - Practice and Procedure - Stay - Application for termination of union's bargaining rights filed before panel hearing first contract application issued its decision - Termination application not reaching panel before panel issued its decision directing the settlement of a first collective agreement by arbitra-		

tion - Board determining appropriate order in which the two applications to be considered in the context of a reconsideration application - Sound labour relations considerations leading Board to consider first contract application first - Termination application dismissed - Termination applicant requesting leave of High Court to bring an application for judicial review in the High Court, an order setting aside Board decisions and a stay of the Board's further hearings to settle the first collective agreement - High Court denying leave - Judicial review application transferred to Divisional Court - Request for stay denied

VENTURE INDUSTRIES CANADA LIMITED, C.A.W. AND ONTARIO LABOUR RELATIONS BOARD; RE RANDY BURKE (June)

749

Termination - First Contract Arbitration - Practice and Procedure - Application for termination of union's bargaining rights filed before panel hearing first contract application issued its decision - Termination application not reaching panel before panel issued its decision directing the settlement of a first collective agreement by arbitration - Board determining appropriate order in which the two applications to be considered in the context of a reconsideration application - Sound labour relations considerations leading Board to consider first contract application first - Termination application dismissed

VENTURE INDUSTRIES CANADA, LTD.; RE C.A.W.; RE RANDY BURKE. (May)

625

Termination - First Contract Arbitration - Practice and Procedure - Board exercising discretion to determine order in which first contract arbitration application and termination application were to be considered - First contract application was filed first, proceedings adjourned for continuing negotiations, then brought back on after filing of termination application - Board directing first contract application to be dealt with first - Bumping first contract arbitration behind termination would provide parties in similar circumstances with little incentive to continue negotiations - Parties having already had three days of hearing with associated expense of first contract issue

NORTHFIELD METAL PRODUCTS LTD.; RE G.M.P.; RE DAVE MIKEL AND GROUP OF EMPLOYEES; RE G.M.P. (AFL-CIO-CLC) (Mar.)

302

Termination - Petition - Circulators of petition holding positions closer to management than other employees - Board less inclined to draw inference adverse to voluntariness of petition in termination application than in certification application - Sufficient assurance of voluntariness in facts of case - Board directing representation vote

KITCHENER BEVERAGES LIMITED, A GROUP OF EMPLOYEES EMPLOYED BY; RE U.F.C.W.; RE KITCHENER BEVERAGES LIMITED (Mar.)

291

Termination - Petition - Petition circulated by brother-in-law of supervisor - Persons circulating petition having close working relationship with supervisor and in same household - Petition not voluntary expression of employee wishes

BENOMA METAL PRODUCTS LIMITED; RE CHRISTOPHER CLAYTON AND GUISEPPE TOCCI; RE U.S.W.A. (Sept.)

917

Termination - Petition - Termination applicant believed employer's intention to increase fishing quotas if fishing boat crew members got rid of union - Applicant used this to persuade crew members to sign a termination petition - Board not persuaded petition voluntary - Application dismissed

POMBINHO, JOAO; RE LOCAL 444 C.A.W. (Apr.)

457

Termination - Petition - Three of four employees who had signed petition to terminate union's

bargaining rights were family members of the owner - Effect of existence of family relationships on voluntariness of petition discussed - Petition found to be voluntary - Vote ordered	
REITZEL, ALAN; RE S.M.W., THE ONTARIO SHEET METAL WORKERS' CONFERENCE AND THE S.M.W., LOCALS 30, 47, 235, 392, 397, 473, 504, 537, 539, 562, AND 269	(Aug.)
	881
Termination - Practice and Procedure - Reconsideration - Representation Vote - Union requesting reconsideration of order for representation vote - Union alleging employer gerrymandered voter list - Allegations, even if true, irrelevant to Board's determination - Adequate protection against gerrymandering through segregated ballot process - Application dismissed	
OTTAWA GREENBELT CONSTRUCTION LIMITED; RE UBALDO MARCHESCHI ON HIS OWN BEHALF AND ON BEHALF OF A GROUP OF EMPLOYEES; RE I.U.O.E., LOCAL 793.....	(Dec.)
	1311
Termination - Timeliness - Collective agreement with retroactive duration clause executed after otherwise timely termination application cannot bar application	
PALMERSTON, TOWN OF; RE ROBERT A. WALLACE; RE U.F.C.W., LOCAL 175	(Jan.)
	65
Termination - Timeliness - Termination application timely only if brought after latest-occurring of statutory scenarios - Twelve months not having elapsed from appointment of conciliation officer - Appointment untimely	
TEAMSTERS CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL 91; RE CLARENCE EDWIN MUIR; RE ACKLANDS LIMITED BY UNISELECT INC.....	(Jan.)
	89
Timeliness - Certification - Membership Evidence - Practice and Procedure - Employer and petitioners arguing that union not entitled to certification because of employer support and alleging that the union had discriminated against one petitioner by not giving him an opportunity to join the union - Allegations not entertained by Board because they were not made in a timely manner as required by Rule 72 - Further allegations of defective membership evidence - Board usually treating non-sign/non-pay allegations with greater latitude on question of timeliness but Rule 72 still applicable - Membership cards alleged to be defective must be identified - Board direction to that effect not complied with - Allegations not entertained - Board also denying access to membership evidence for the purpose of having the employer's handwriting analyst review it - Parties agreeing certification application should be dismissed	
ROYTEC VINYL CO., 732571 ONTARIO LTD. AND 732570 ONTARIO INC. C.O.B. IN PARTNERSHIP AS; RE LAUNDRY & LINEN DRIVERS AND INDUSTRIAL WORKERS UNION, LOCAL 847, AFFILIATED WITH THE TEAMSTERS' UNION; RE GROUP OF EMPLOYEES	(June)
	727
Timeliness - Certification - Petition - Practice and Procedure - Whether petition sent to the Board on the terminal date by Priority Post timely - 'Registered' mail including Priority Post - Petition timely	
SAXON ATHLETIC MANUFACTURING INC.; RE IWA - CANADA; RE GROUP OF EMPLOYEES.....	(May)
	618
Timeliness - Practice and Procedure - Religious Exemption - Application for exemption from union dues - No collective agreement in force yet between trade union and employer - Board having no jurisdiction - Application premature - Board not willing to give hypothetical response to possible future circumstances	
LIEDEMAN, DOREEN; RE C.U.P.E.; RE VAUGHAN PUBLIC LIBRARIES ..(Apr.)	
	429

Timeliness - Termination - Collective agreement with retroactive duration clause executed after otherwise timely termination application cannot bar application

PALMERSTON, TOWN OF; RE ROBERT A. WALLACE; RE U.F.C.W., LOCAL 175 (Jan.)

65

Timeliness - Termination - Termination application timely only if brought after latest-occurring of statutory scenarios - Twelve months not having elapsed from appointment of conciliation officer - Appointment untimely

TEAMSTERS CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL 91; RE CLARENCE EDWIN MUIR; RE ACKLANDS LIMITED BY UNI-SE-LECT INC. (Jan.)

89

Trade Union - Adjournment - Certification - Evidence - Membership Evidence - Petition - Trade Union Status - Technical amendment of application permitted to show true name of union - Membership cards headed by name of local union bringing application, but body of cards referring only to national union - Cards valid membership evidence for local union - Adjournment request on grounds of unavailability of objecting employee counsel denied - Petition circulated on employer premises and during working hours - Petitioners observed by foreman - Petition not voluntary expression of employee wishes - Certificate issuing

CHAPLEAU FOREST PRODUCTS LIMITED; RE IWA-CANADA, LOCAL 1-2995; RE GROUP OF EMPLOYEES (Dec.)

1243

Trade Union - Certification - Evidence - Trade Union Status - Board not satisfied that applicant organization had complied with International By-Laws in establishing Local Constitution - Applicant failing to file current International Constitution - Board unable to conclude whether applicant governed by Local or International Constitution - Board unable to conclude that applicant was "trade union" - Applicant filing photocopies of membership evidence - Photocopies not normally acceptable as membership evidence for certification in absence of satisfactory reasons why originals not available - Application dismissed

OPERA GHOST PRODUCTIONS INC.; RE I.A.T.S.E., THEATRICAL WARDROBE UNION, LOCAL 822 (Mar.)

325

Trade Union - Certification - Natural Justice - Practice and Procedure - Union filing membership evidence - Union name on cards different from name under which application brought - Board will not treat application for membership as membership in another union unless former is local of latter - Board satisfied application intended to be brought by union named on membership cards - Board permitting amendment to union name on application - Board extending terminal date and directing new posting of Form 6 Notice of Application at workplace

GOODY CANADA LIMITED; RE A.C.T.W.U. (Feb.)

159

Trade Union - Certification - Practice and Procedure - Six month bar imposed against local of union following unsuccessful representation vote - Parent union of local filing certification application 4 weeks later - Whether bar applies to parent union - Whether Board should exercise its discretion to decline to hear application - Application to be processed - Parent union a separate legal entity - Bar not applicable - No compelling reason to decline to entertain application

REPLA LIMITED; RE C.J.A. (May)

612

Trade Union - Certification - Practice and Procedure - Trade Union Status - No finding of status at the time application was filed, but its status was recognized by the Board in another unrelated proceeding, before the hearing date in this application - Union not obliged to

prove status - Outstanding status issue no bar to meeting with Labour Relations Officer - Certificate issuing

SHORELINE MOTOR HOTEL, RONSCOTT INC. C.O.B. AS; RE HOSPITALITY, COMMERCIAL AND SERVICE EMPLOYEES UNION, LOCAL 73 OF H.E.R.E. (Dec.)

1334

Trade Union Status - Adjournment - Certification - Evidence - Membership Evidence - Petition - Trade Union - Technical amendment of application permitted to show true name of union - Membership cards headed by name of local union bringing application, but body of cards referring only to national union - Cards valid membership evidence for local union - Adjournment request on grounds of unavailability of objecting employee counsel denied - Petition circulated on employer premises and during working hours - Petitioners observed by foreman - Petition not voluntary expression of employee wishes - Certificate issuing

CHAPLEAU FOREST PRODUCTS LIMITED; RE IWA-CANADA, LOCAL 1-2995; RE GROUP OF EMPLOYEES (Dec.)

1243

Trade Union Status - Certification - Applicant citing recognition as employee organization by Ontario Public Service Labour Relations Tribunal - Trade union status question of fact in each case - Board having regard for applicant's history as bargaining agent for Crown employees - Applicant fitting statutory definition

VAUGHAN, THE CORPORATION OF THE TOWN OF, AND TOKMAKJIAN LIMITED; RE A.T.U., LOCAL 1587; RE GROUP OF EMPLOYEES.....(Jan.)

102

Trade Union Status - Certification - Certification Where Act Contravened - Charter of Rights and Freedoms - Union constitution denying office to any person associated with or supporting certain subversive organizations - Employer arguing provision contravenes *Charter* and should lead Board to deny union status - Provision not applied in Canada - Focus of inquiry is whether prohibited discrimination exists in practice and not merely whether an allegedly discriminating provision is present in union constitution - Board finding trade union status - Certificate issuing

QUETICO CENTRE; RE HOSPITALITY, COMMERCIAL AND SERVICE EMPLOYEES UNION, LOCAL 73 OF H.E.R.E. (Nov.)

1149

Trade Union Status - Certification - Evidence - Trade Union - Board not satisfied that applicant organization had complied with International By-Laws in establishing Local Constitution - Applicant failing to file current International Constitution - Board unable to conclude whether applicant governed by Local or International Constitution - Board unable to conclude that applicant was "trade union" - Applicant filing photocopies of membership evidence - Photocopies not normally acceptable as membership evidence for certification in absence of satisfactory reasons why originals not available - Application dismissed

OPERA GHOST PRODUCTIONS INC.; RE I.A.T.S.E., THEATRICAL WARDROBE UNION, LOCAL 822 (Mar.)

325

Trade Union Status - Certification - Officer of applicant testifying as to steps taken by employees to form trade union - Draft constitution reviewed, amended, and adopted - Terms of constitution sufficiently comprehensive to allow Board to conclude applicant was viable organization formed for purposes of representing employees in their labour relations - Applicant falling within statutory definition of trade union

STANDARD INDUSTRIAL TECHNOLOGIES INC.; RE UNITED EMPLOYEES OF STANDARD INDUSTRIAL TECHNOLOGIES INC. (Feb.)

220

Trade Union Status - Certification - Practice and Procedure - Trade Union - No finding of status at the time application was filed, but its status was recognized by the Board in another unrelated proceeding, before the hearing date in this application - Union not obliged to

prove status - Outstanding status issue no bar to meeting with Labour Relations Officer - Certificate issuing		
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Unfair Labour Practice - Abandonment - Bargaining Unit - Duty of Fair Representation - Union and employer agreeing to exclusion of casual employees from collective agreement coverage in 1985 - Complainants employed as casuals in 1986 and 1987 - Complainants earning less than if covered by agreement and complaining of breach of duty of fair representation - Board dismissing complaint - Union abandonment of casual representation rights occurring before employment of complainants - Complainants not employees in bargaining unit which union continued to be entitled to represent - Abandonment of part of bargaining unit not <i>per se</i> breach of fair representation duty where not arbitrary, discriminatory, or in bad faith - Union estopped from asserting representation rights in any case		
STOTHERS, TED AND BRUCE SKREPTAK; RE B.B.F, LOCAL 128; RE HYDRA-DYNE INDUSTRIAL CLEANING SERVICES LTD.....	(Mar.)	347
Unfair Labour Practice - Adjournment - Judicial Review - Practice and Procedure - Board refusing to grant adjournment - Board acting fairly and reasonably - Application dismissed		
BALANYK, ELIZABETH; RE THE GREATER NIAGARA GENERAL HOSPITAL, ONTARIO NURSES' ASSOCIATION, PATRICIA STUART, MARIANNE ORCUTT, AL WEIER, LIZ WOODS, AND O.L.R.B.	(Nov.)	1198
Unfair Labour Practice - Arbitration - Duty of Fair Representation - Judicial Review - Bargaining unit members petitioning union to seek judicial review of arbitration decision - Union declining to seek review - Decision based solely on legal opinions on chances of success - Board applying same standard as to decision whether to arbitrate a grievance - Union not obliged to seek review even if review supported by unit members - Union not obliged to seek review where chance of success - Union entitled to refuse on merits in context of other considerations grounded in union's role as exclusive bargaining agent and collective bargaining - Union failure to explain reasons not breach of duty - Complaint dismissed		
McINTYRE, ROBERT; RE U.S.W.A., LOCAL 14045; RE ZALEV BROTHERS LIMITED.....	(Feb.)	175
Unfair Labour Practice - Bargaining Rights - Interference in Trade Unions - Related Employer - Remedies - Complaint involving the transfer of work from Condor to Progressive and the resultant layoff of half the bargaining unit, the failure of Progressive to hire laid off Condor employees and letters to laid off employees - Condor bound by collective agreement with union with scope clause limited to Toronto - Progressive outside that geographic scope - Employer not breaching Act by not bargaining enhanced severance package with the union given the silence of the collective agreement on issue of severance entitlement and requirements of <i>Employment Standards Act</i> - No breach in failure to hire laid off Condor employees - Board declaring Condor and Progressive one employer but declining to exercise its discretion to extend scope clause in Condor's collective agreement to Progressive		
PROGRESSIVE PACKAGING LIMITED, CONDOR LAMINATIONS, INNOPAC INC.; RE TORONTO TYPOGRAPHICAL UNION, NUMBER 91, PRINTING PUBLISHING AND MEDIA WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF NORTH AMERICA	(May)	592
Unfair Labour Practice - Bargaining Unit - Collective Agreement - Duty to Bargain in Good Faith - Final Offer Vote - Strike - Voter eligibility in final offer vote limited under circumstances to persons who were employees in bargaining unit at time strike began, except where connection to workplace severed prior to date of vote - Injured employee with no		

expectation of returning to bargaining unit not eligible to vote - Good faith bargaining obligation not requiring employer to discuss new information with trade union prior to requesting or participating in final offer vote - Board refraining from exercising discretion to grant unlawful strike declaration or direction - Trade union refusal to execute collective agreement constituting under circumstances breach of duty to bargain in good faith - Board directing union to bargain in good faith, submit to vote results, and execute collective agreement reflecting final offer accepted in vote

MCINTYRE, WILF, FRED MIRON, ROLAND FRAYNE, NIELS HUSMAN, LARRY DUHAIME AND I.W.A. - CANADA, LOCAL 2693; RE PROSPER BRIZZARD, RICHARD BRIZZARD, ROBERT CASSON, RICHARD KOSKI, DAVID JAGGARD, MANFRED KRAUSE, ROBERT KRAUSE, DAVID ROSS, AULIUS TIITTO, DARRELL WESTOVER, RAYNARD JACOBSON, BRUCE NORDSTROM AND LARRY JAGGARD; RE GRAVEL AND LAKE SERVICES LIMITED (Oct.)

1052

Unfair Labour Practice - Build-Up - Certification - Interference in Trade Unions - Intimidation and Coercion - Membership Evidence - Petition - Representation Vote - Whether Board should order a vote to be conducted in the future - Employer having no firm plans for build-up as of the application date nor was build-up of the magnitude that would lead the Board to order and defer a vote - Employer alleging that misconduct by employee organizing committee made union's membership evidence unreliable - Misconduct alleged to have occurred including intimidation of petitioners - Conduct of employee organizers not leading Board to order vote - Employer found to have breached Act by questioning employees about their support for the union - Certificate issuing

GSW INC. C.O.B. AS GSW HEATING PRODUCTS DIVISION; RE U.S.W.A.; RE GROUP OF EMPLOYEES (May)

535

Unfair Labour Practice - Certification - Certification Where Act Contravened - Discharge - Discharge for Union Activities - Interference in Trade Unions - Union supporters discharged during organizing campaign - Union having sufficient membership support for representation vote - Discharges likely to have had chilling effect - Vote not likely to show true wishes - Certificate issuing - Reinstatement, compensation, and posting orders made

REPLA LIMITED; RE C.J.A. (Dec.)

1319

Unfair Labour Practice - Certification - Certification Where Act Contravened - Interference in Trade Unions - Intimidation and Coercion - Employer implementing planned layoff two days early after learning about organizing campaign - Employees would reasonably perceive events as connected - Union filing cards for about thirty percent of bargaining unit - No reason to discount union support among laid off employees - Employees on temporary layoff having ongoing interest or connection with workplace - Certificate issuing

ROMATT CUSTOM WOODWORK INC.; RE C.J.A., LOCAL 27 (Aug.)

894

Unfair Labour Practice - Certification - Construction Industry - Intimidation and Coercion - Membership Evidence - Employer alleging that union's membership evidence was obtained in violation of Act - Union representative making statements to employees that if they did not sign union cards they would be removed from work site - Board finding that union was only attempting to enforce its collective agreement with the general contractor - No improper conduct - Certificates issuing

CUNEO INTERIORS; RE C.J.A., LOCAL 27..... (May)

499

Unfair Labour Practice - Certification - Employer Support - Petition - Whether employer providing union with names and addresses of employees during organizing campaign prohibiting the certification of union - Provision of this information not constituting "support" within the meaning of s.13 - Meeting of employees called by employer factor to consider in looking at voluntariness of petition - No violation of Act when lead hands circulating petition

expressed personal views on the consequences of unionization - Failure of one of two originators/circulators of petition to testify another factor to consider - Petition not voluntary - Certificate issuing	
CONTINUOUS MINING SYSTEMS LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES	404
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NATIONAL NEWS COMPANY LIMITED; RE TEAMSTERS UNION, LOCAL 91; RE GROUP OF EMPLOYEES	(Aug.)
Unfair Labour Practice - Certification Where Act Contravened - Charter of Rights and Freedoms - Judicial Review - Layoff and intimidation of employees, and granting of wage increases constituting unfair labour practices - Letter to employees from president of company proper exercise of employer free speech - Reverse onus not contrary to Charter - Petition rejected - First contract legislation not altering section 8 jurisprudence - Certificate issuing - Unnecessary for union to call every grievor as a witness - All laid-off employees reinstated with compensation - Application for leave to appeal to the Court of Appeal dismissed	
BAYDAK, DONNA ON BEHALF OF A GROUP OF 156 EMPLOYEES; RE O.L.R.B. AND U.F.C.W., LOCAL 206 AND KNOB HILL FARMS LIMITED	(Oct.)
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DAVID CHAPMAN'S ICECREAM LIMITED; RE U.F.C.W., LOCAL 175	(July)
Unfair Labour Practice - Certification Where Act Contravened - Interference in Trade Union - Intimidation and Coercion - Employer firing four union supporters and failing to retain another union supporter for training of replacement - Events occurring shortly after start of organizing campaign - Employees so intimidated by employer conduct that usual remedies unlikely to be effect - Vote unlikely to reveal true wishes - Union filing cards for approximately 25% of bargaining unit - Employer actions severe and at start of campaign - Substantial additional union support likely but for employer actions - Union having adequate support for collective bargaining - Certificate issuing	
NEPEAN BUS LINES INC.; RE TEAMSTERS' UNION, LOCAL 91; RE DAVE LONEY	(Mar.)
Unfair Labour Practice - Change in Working Conditions - Interference in Trade Unions - Intimidation and Coercion - Employer dismissing employee involved in organizing campaign and sitting on bargaining committee - Dismissal occurring during "statutory freeze" period - Employee dismissed for irregularities in credit card vouchers - Board satisfied on balance reasons given by employer were only reasons for dismissal - Complaint dismissed	
HY'S STEAK HOUSE, HYDON HOLDINGS LTD. C.O.B. AS; RE R.W.D.S.U., AFL-CIO-CLC	(Feb.)
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pel established - Public interest not requiring that agreement between employer and union be treated as collective agreement under Act if parties agree otherwise - Unfair to permit retroactive characterization of agreement such that employer would have refused to sign it had characterization been applied at the time - Union estopped from asserting agreement one covered by Act

ONTARIO HYDRO; RE THE SOCIETY OF ONTARIO HYDRO PROFESSIONAL AND ADMINISTRATIVE EMPLOYEES; RE THE COALITION TO STOP THE CERTIFICATION OF THE SOCIETY, ON BEHALF OF CERTAIN EMPLOYEES...(Mar.)

305

Unfair Labour Practice - Colleges Collective Bargaining Act - Discharge - Practice and Procedure - Whether complainant theatre technician discharged because it was thought he was going to testify in the arbitration grievance filed by another employee - No reverse onus under CCBA - Complainant had to satisfy Board on balance of probabilities that there was no improper motive for the discharge - No part of motivation constituting breach of CCBA - Complaint dismissed

SENECA COLLEGE OF APPLIED ARTS AND TECHNOLOGY; RE O.P.S.E.U. AND ITS LOCAL 561 AND LESLIE CHARBON

(June)

Unfair Labour Practice - Colleges Collective Bargaining Act - Duty of Fair Representation - Complainants alleging right under collective agreement and union constitution to arbitration of grievances and to representation by own chosen representative, whether or not union steward - Complainants alleging union breached duty of fair representation by settling workload grievance without grievor consent, by agreeing to consent arbitration award, and by amending collective agreement - Collective agreement not a contract between union and members enforceable through duty of fair representation - Union constitution not enforceable through duty of fair representation, but relevant to determination of whether union conduct arbitrary, discriminatory or in bad faith - Board finding no breach of duty

WILSON, ANNA; RE O.P.S.E.U., LOCAL 110; RE FANSHawe COLLEGE AND THE ONTARIO COUNCIL OF REGENTS FOR COLLEGES OF APPLIED ARTS AND TECHNOLOGY

(Nov.)

Unfair Labour Practice - Construction Industry - Health and Safety - Strike - Employer requiring all employees to wear bellyhooks, whether or not needed in work - Employees believing bellyhooks unsafe and refusing to wear as way of demonstrating refusal to use under any circumstances - Employer refusing to assign work to employees refusing to wear bellyhooks - Employer seeking illegal strike declaration and damages - Employees alleging reprisal contrary to *Occupational Health and Safety Act* - Refusal not justified under *Occupational Health and Safety Act* since mere wearing of bellyhooks not alleged to endanger - No refusal to work since no work assigned - Complaints and application dismissed

GILBERT STEEL LIMITED; RE B.S.O.I.W. LOCAL 721, GEORGE JONCAS, ALFIE THOMAS, AND AARON MURPHY ON THEIR OWN BEHALF AND ON BEHALF OF THE RESPONDENT UNION; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, ONTARIO HYDRO RE B.S.O.I.W., LOCAL 721, ON BEHALF OF ITS REINFORCING RODMEN NAMED IN SCHEDULE "B" TO THE COMPLAINT; RE B.S.O.I.W., LOCAL 721, GEORGE JONCAS, ALFIE THOMAS, JOHN DONALDSON AND AARON MURPHY

(Feb.)

Unfair Labour Practice - Damages - Board remaining seized with calculation of damages - Request by respondent employer for the panel to reconvene to clarify the relationship between an award under the *Employment Standards Act* and the Board's award of damages

- Request premature - Parties should try to work out quantum of compensation themselves before coming to the Board for assistance	
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DENEAU, RHONDA; RE G.M.P. LOCAL #49; RE MULTI-FITTINGS	423
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PLAZA FIBREGLAS MANUFACTURING LTD., PLAZA ELECTROPLATING LTD., CITCOR MANUFACTURING LTD. AND SABINA CITRON; RE ONTARIO LABOUR RELATIONS BOARD AND U.S.W.A.....	747
Unfair Labour Practice - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Lockout - Remedies - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for	

final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches, to pay union's negotiating costs, to return work to original company and make no further movement without disclosure to union, to provide union with names and addresses of bargaining unit employees as of lockout date, and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees

PLAZA FIBERGLAS MANUFACTURING LIMITED AND PLAZA ELECTRO-PLATING LTD., CITCOR MANUFACTURING LTD., AND SABINA CITRON; RE U.S.W.A.....(Feb.)

102

Unfair Labour Practice - Discharge - Discharge for Union Activity - Interference in Trade Unions - Employee discharged after minor misconduct - Employee had unsatisfactory performance record and knew his employment was in jeopardy - Employer knew employee had been involved in organizing campaign and might be on negotiating committee - While the appearance that a discharge is arbitrary or harsh may undermine an employer's assertion that union activity played no part in its decision, the appropriateness of discharge in the circumstances is not the issue before the Board - Evidence consistent with conclusion that termination was in no way caused by anti-union animus - Complaint dismissed

SUDBURY YOUTH SERVICES INC.; RE O.P.S.E.U.(Dec.)

1339

Unfair Labour Practice - Duty of Fair Referral - Complainant was listed higher than other referred workers, but not listed as having necessary skills for the job - Referral system putting onus on members to notify union of skills - Complainant not notifying union - Failure of union to inquire whether complainant had necessary skills no breach of duty of fair referral - Complaint dismissed

PLENNEVAUX, ANTOINE A.; RE L.I.U.N.A., LOCAL 1036.....(Dec.)

1314

Unfair Labour Practice - Duty of Fair Representation - Complainant alleging union failed to process his grievance to arbitration - Union displaced by rival union before grievance process exhausted - Fair representation duty expiring with bargaining rights - Union conduct after date of displacement not subject to duty - Complaint dismissed

REED, KEVIN; RE S.M.W., LOCAL 540; RE S.W. FLEMING LIMITED.....(Nov.)

1152

Unfair Labour Practice - Duty of Fair Representation - Complainant's claim for disability benefits rejected by insurer because time limit for filing exceeded - Union not obliged under circumstances to protect complainant's rights by soliciting a grievance from her - Complaint dismissed

GASIOREK, PEGGY JOE; RE C.U.P.E., LOCAL 1263 AND REGIONAL MUNICIPALITY OF NIAGARA.....(Dec.)

1271

Unfair Labour Practice - Duty of Fair Representation - Employer reorganizing work - Reorganization leaving complainant performing work within two different bargaining units - Union representing both units - Union not challenging reorganization and seeking flexibility over work - Union entitled to assess competing interests of bargaining unit members in light of collective agreement - Complaint dismissed

GATES, FRANK; RE H. J. HEINZ COMPANY OF CANADA LTD., U.F.C.W., LOCAL 459.....(Mar.)

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Unfair Labour Practice - Duty of Fair Representation - Failure of union to seek judicial review of

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Unfair Labour Practice - Duty of Fair Representation - Natural Justice - Practice and Procedure - Settlement - Complainants alleging union breached fair representation duty by agreeing to settlement of employer's severance pay obligations - Approximately three years passing between signing of settlement and filing of complaint - Board reluctant to allow litigation of complaints after such extreme delay, especially where matter complained of involves a settlement which has been executed and honoured, and when the effect of remedial relief sought is to nullify or rewrite the settlement - Complaint dismissed	
COALITION OF LAID-OFF WORKERS, THE, ONTARIO, CANADA HEREINAFTER KNOWN AS THE C.L.W.; RE C.A.W., LOCALS 439 AND 458; RE VARTY CORPORATION	(Oct.) 1019
Unfair Labour Practice - Duty of Fair Representation - Practice and Procedure - Motion by counsel for the complainants to have the Board remove counsel for the union on basis of conflict of interest - Argued that counsel for respondent had acted on behalf of the complainants on grievances and had received confidential information in that capacity - Whether Board has the jurisdiction to compel a party to change counsel - Board discussing jurisdiction over professional conduct of barristers and solicitors - Board declining to entertain motion on discretionary grounds	
WILSON, ANNA; RE O.P.S.E.U. AND O.P.S.E.U., LOCAL 110; RE FANSHAWE COLLEGE; RE ONTARIO COUNCIL OF REGENTS FOR THE COLLEGES OF APPLIED ARTS AND TECHNOLOGY	(Apr.) 481
Unfair Labour Practice - Duty of Fair Representation - Settlement - Complainant registered nurse terminated after he refused to submit to a psychiatric examination - Arbitration of complainant's grievance scheduled but settlement reached beforehand - Complainant signing settlement - Complainant arguing before Board that he was under improper pressure to accept settlement and its terms were unfair - Fair representation complaint against union dismissed	
LEONARD, DENNIS; RE O.N.A.; RE MOUNT SINAI HOSPITAL	(May) 575
Unfair Labour Practice - Duty of Fair Representation - Strike - Union's refusal to provide "strike pay" to a member is an internal matter which does not involve the representation of a bargaining unit employee in relation to employer - Complaint not under Board's jurisdiction to deal with fair representation complaints - Complaint dismissed	
GAUTHIER, IRENE; RE I.W.A. - CANADA, LOCAL 1-1000	(Oct.) 1041
Unfair Labour Practice - Duty of Fair Representation - Union failing to take discharge grievance to arbitration - Dismissed employee having arguable case under collective agreement - No evidence union considered impact on complainant, union, or bargaining unit - Board finding breach of duty and ordering parties to proceed to arbitration	
ROBERTSON, MARCIA; RE U.F.C.W., AFL-CIO, LOCAL 114P; RE CANADA PACKERS INC.	(Aug.) 886

Unfair Labour Practice - Duty of Fair Representation - Union signed 'survival agreement' including agreement to separate bargaining units and collective agreements for future franchised or converted stores - Agreement ratified by union membership - Union later negotiated and signed model agreement for converted stores without seeking consultation or ratification of membership - Complaints alleging union breached representation duty by failing to hold vote - Act specifying manner in which vote to be held but not requiring vote - Union acted reasonably in interpreting original agreement as not requiring ratification of agreements for franchised or converted stores - Requirements of constitution met when original agreement ratified - Complaint dismissed

STEINBERG INC.; RE GORDON KNOWLES, JOAN LEPAGE, SUE LAMONTHE AND DON WADE; RE U.F.C.W., LOCAL 175 (Sept.)

968

Unfair Labour Practice - Duty of Fair Representation - Union striking committee to negotiate mine closure agreement - Agreement signed without ratification vote - Whether union breached fair representation duty by not electing committee, not holding a ratification vote and not providing more information on pension formula - Union having little bargaining power because collective agreement in effect - No bad faith in way committee struck nor in lack of vote - Considerable efforts made to inform employees of contents of closure agreement after it had been signed - Complaint dismissed

PRYOR, ROGER ET AL; RE U.S.W.A., LOCAL 6896; RE CLIFFS OF CANADA LIMITED..... (July)

790

Unfair Labour Practice - Duty to Bargain in Good Faith - Employer demanding that union supply information on its membership procedures before he would meet with it - Failure of union to provide information not relieving employer of obligation to bargain in good faith

BONIK INCORPORATED; RE U.A., LOCAL 800..... (Sept.)

925

Unfair Labour Practice - Evidence - Interference in Trade Unions - Intimidation and Coercion - Practice and Procedure - Complainant denied installation work after returning from vacation - Board reviewing effect of reverse onus of proof - Board reviewing relevant factors in determining existence of anti-union animus - Reinstatement ordered with compensation for damages and workplace posting

SIDING I.P.E. LIMITED; RE C.J.A., LOCAL 27 (Oct.)

1097

Unfair Labour Practice - First Contract Arbitration - Interference in Trade Unions - Intimidation and Coercion - Lockout - Remedies - Employer recalling employees after first contract arbitration direction by Board - Employees subsequently laid off for "lack of work" - Layoff followed by employer approach to two members of union negotiating team with concessionary package - Employer use of layoff as lever to induce employees to agree to concessions constituting illegal lockout where first contract arbitration direction made - Layoff constituting intimidation - Approaches to negotiating team members constituting direct bargaining and interference in trade union - Employer bankruptcy not improperly motivated - Employer personally and corporately liable for damages

BOURQUE CONSUMER ELECTRONICS SERVICE INC. AND MR. PIERRE BOURQUE; RE C.A.W. AND ITS LOCAL 673 (Oct.)

999

Unfair Labour Practice - Intimidation and Coercion - Strike - Collective agreement permitting inspectors to maintain union membership and departmental seniority rights on return to bargaining unit, provided they maintained union membership - Inspectors threatened with expulsion by union if they performed bargaining unit work during strike - Expulsions carried out - Employer arguing union counselled illegal strike and penalized inspectors for failure to participate in illegal strike - Refusal by inspectors to work would not have been "strike" by "employees" within meaning of Act - Illegal strike provisions of Act inapplicable - No intimidation or coercion - Act giving only limited rights to managerial personnel -

Statutory provision making agreement binding on employer and union not creating rights under Act for managerial personnel - Complaint dismissed	
TORONTO TRANSIT COMMISSION; RE A.T.U., LOCAL 113; RE WILLIAM L. FRANCO ET AL.....	(Dec.)
Unfair Labour Practice - Practice and Procedure - Collective Agreement - Duty of Fair Representation - Employee objecting to early termination of collective agreement - Employee arguing Board should not decide early termination application until his fair representation complaint had been dealt with - Employee objecting to union handling of vote on employer's last offer - Employer threatening to shut down all three plants if concession package not agreed to for all locations - Union totalling votes from all 3 locations and agreeing to accept package - Union making honest "hard choice" - Union not obliged to take vote on acceptance of employer offer or to follow employee wishes - Union affirming early termination - Fair representation complaint not concerned with "open period" and not seeking matter relevant to Board's discretion - Fair representation complaint need not be heard first - Complaint dismissed - Early termination decision affirmed	1346
STELCO FASTENER & FORGING CO., STELCO INC.; RE U.S.W.A., LOCAL 3767 AND 3749; RE FRED J. ZICARD	(Mar.)
Union Security - Collective Agreement - Union alleging that employer failed to remit to it dues that had been deducted from employees' pay pursuant to a collective agreement - Matter had originally been settled at arbitration on agreement of the parties that the dispute would be submitted as a complaint to the Board - Board dismissing complaint for lack of jurisdiction - Matter is one for a grievance arbitration board - Board's jurisdiction cannot be expanded by the parties' agreement	339
CARAVAN TRAILER RENTAL CO. LIMITED; RE I.A.M., LOCAL LODGE 2511 AND DISTRICT LODGE 717.....	(June)
Union Security - Complainant challenging reasonableness of \$12,000 fine assessed by union for mismanagement of union funds while treasurer - \$120,000 missing or unaccounted for during complainant's term of office - Complainant unsuccessfully appealed fine through internal union process - Board dismissing complaint - Board having authority to review internal union process for purpose of determining reasonableness of fine - Process arising from legitimate union concern - Complainant having fair opportunity to hear case against him and defend against charges - No evidence process was malicious attempt to deprive complainant of union membership - Amount of fine not out of proportion under circumstances - Assessment not unreasonable	647
CONNELL, DAVID; RE KRUGER INC. AND C.P.U.	(Mar.)
Union Successor Status - Bargaining Unit - Board having no jurisdiction to amend bargaining unit description - Board jurisdiction confined to declaration of successor status with all rights, privileges, and duties of predecessor, or dismissal of application - Carving out of separate unit for technicians inappropriate in any event since objections unrelated to union merger - Declaration of union successor status issuing	230
HAMILTON-WENTWORTH ROMAN CATHOLIC SEPARATE SCHOOL BOARD PROFESSIONAL STAFF ASSOCIATION, THE; RE C.U.P.E.; RE GROUP OF EMPLOYEES	(Jan.)
Union Successor Status - Charter of Rights - Construction Industry - Judicial Review - Two locals of same union merged - Officers and members of one local opposed - Employer given status to intervene but not permitted to lead evidence on the consequences of the merger on its business operations -Merger in compliance with union constitution - Constitution not requiring membership approval - Divisional Court upholding Board decision - Failure to	49

hold vote no infringement of Charter freedom of association - Board operated within limits of statutory discretion in making successor declaration

I.B.E.W., LOCAL 594, PATRICK WYSE AND MAURICE WALSH; RE I.B.E.W., LOCAL 586 (Dec.)

1365

Voluntary Recognition - Bargaining Rights - Evidence - Representation Vote - Termination - Termination application brought within first year of voluntary recognition - Majority support in union cards signed at time of recognition is sufficient evidence to create a rebuttable presumption of union entitlement to representation - Act not anticipating representation vote except where there is uncertainty of employee wishes at the time of recognition agreement - Board declining to hold vote and dismissing application

CEDARVALE WOODWORKING LIMITED; RE ANTONIO BERTUCCI; RE C.J.A., LOCAL 27..... (Aug.)

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Witness - Certification - Charter of Rights and Freedoms - Evidence - Natural Justice - Practice and Procedure - Employee sidesperson while former MPP had objected in Legislature to provision of Act - Constitutionality of provision challenged in current proceedings - Employer alleging reasonable apprehension of bias - Board rejecting allegation - Board members appointed because of labour relations experience - Remarks made in different context nineteen years ago - Union seeking to call expert witness on content of freedom of association in European countries - Evidence analogous to legal argument about proper scope of freedom of association - Evidence not admissible in determining content of *Charter* freedom - Evidence admissible in determining whether provision reasonable limit to *Charter* freedom

PINKERTON'S OF CANADA; C.G.A.; RE RICHARD BIBEAULT; RE INCO LIMITED; RE ATTORNEY-GENERAL OF ONTARIO; RE NATIONAL PROTECTIVE SERVICES COMPANY LIMITED; RE GEORGE FAULKENBURG; RE BOARD OF MANAGEMENT FOR THE METROPOLITAN TORONTO ZOO; RE INTERNATIONAL UNION UNITED PLANT GUARDS, LOCAL 1962; RE RON SAXTON; RE BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE GORDON A. SOUTHORN; RE WACKENHUT OF CANADA LIMITED; RE SHANE FREEMAN; RE U.S.W.A.; RE LARRY BISHOP (Jan.)

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Witness - Construction Industry - Evidence - Jurisdictional Dispute - Practice and Procedure - Board power to compel the production of documents and to determine its own practice and procedure includes the power to direct that documents be made available for cross-examination - Board emphasizing the need to minimize document-related adjournments - Board directing further witnesses to bring documents relating to their testimony - Board directing respondent counsel to provide witnesses with copy of decision

ACCO CANADIAN MATERIAL HANDLING, A DIVISION OF BABCOCK INDUSTRIES CANADA INC. AND IRONWORKERS DISTRICT COUNCIL OF ONTARIO AND B.S.O.I.W., LOCAL 700; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1244(Aug.)

819

Witness - Discharge - Evidence - Health and Safety - Employee discharged after discussing petition for a lunchroom with another employee - Board permitting employee to recall employer's witness - Employee discharged for reasons unrelated to health and safety - Majority unwilling to exercise discretion under section 24(7) of *Occupational Health and Safety Act* to modify penalty - Exercise of discretion under Section 24(7) inappropriate where no connection between health and safety concern expressed by employee and employer conduct or actions - Complaint dismissed

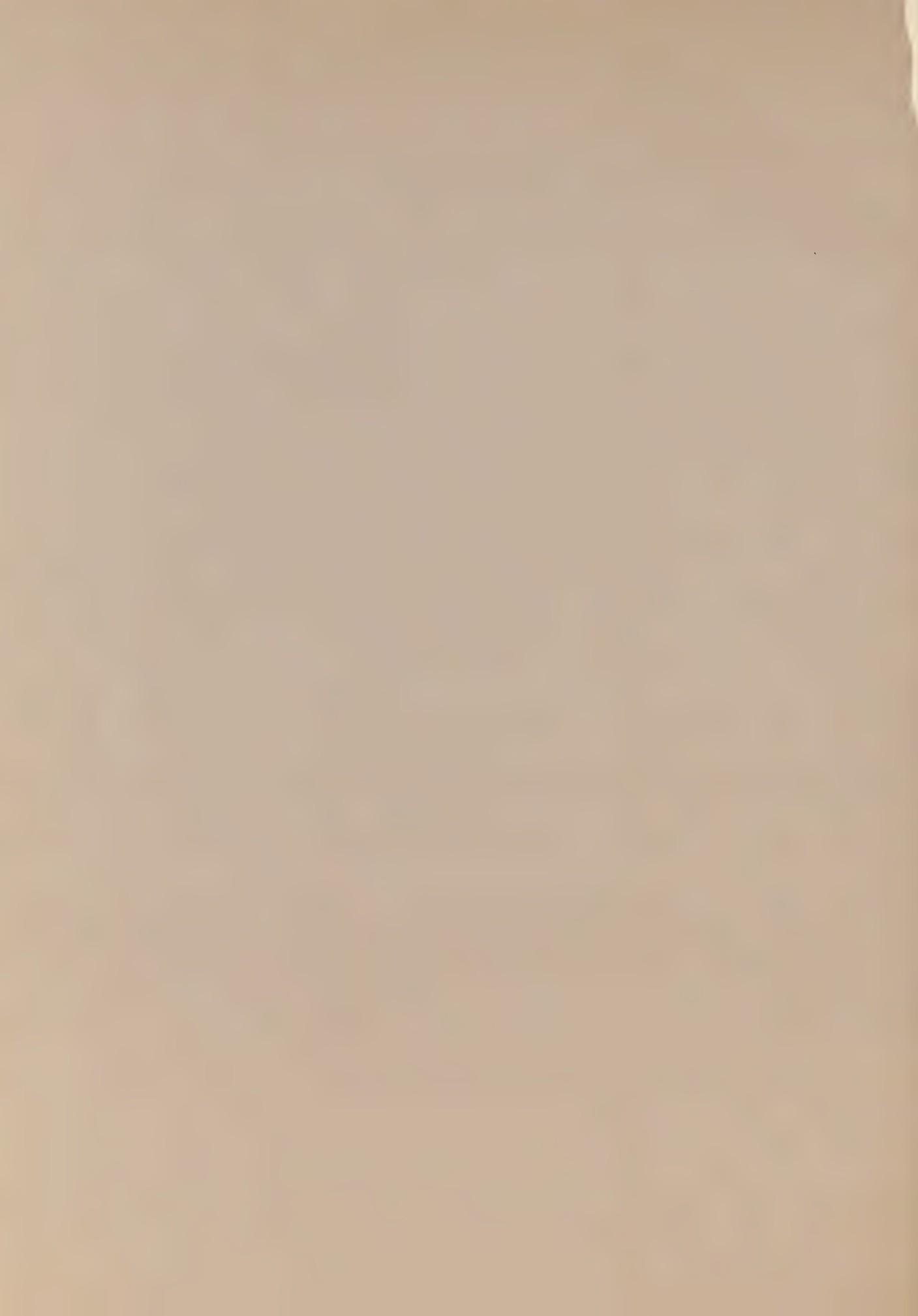
NATIONAL PLASTIC PROFILES INC.; RE STEVE MIKE SZEGHALMI (Oct.)

1078

Witness - Evidence - Practice and Procedure - Privilege - Settlement - Employer alleging it agreed

to a settlement because it mistakenly believed the union would provide certain assurances - Assurances not incorporated into settlement document - Employer seeking to adduce evidence of settlement discussions with Board officer and union - Board denying consent to hear such evidence as to do so would undermine the settlement process and the impartiality of Board officers	
LUME MASONRY LTD.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GROUP OF EMPLOYEES; RE LUME CONSTRUCTION LIMITED	(Aug.)
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Witness - Practice and Procedure - Board reviewing requirements of valid summons - Summons must be served personally with appropriate conduct money - Conduct money must be cash - Summons unenforceable where conduct money was in the form of a money order	
TOPPLE, CHRISTOPHER; RE U.P.G.W.A., LOCAL 1962; RE GENERAL MOTORS OF CANADA	(Dec.)
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Witness - Practice and Procedure - Evidence - Objections to conduct in inquiry before Labour Relations Officer to be dealt with in accordance with Practice Note #4 - Questions put to witness at inquiry not improper merely because they raise an issue of credibility	
MAPLE ENGINEERING & CONSTRUCTION CANADA LTD.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE C.L.A.C.	(Nov.)
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